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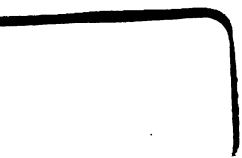
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**JOHN A. O'HARE**  
**SOLICITOR,**  
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2 Vols.

570

A COMPENDIUM  
OF  
THE LAW OF  
REAL AND PERSONAL PROPERTY,

PRIMARILY CONNECTED WITH CONVEYANCING:

DESIGNED AS

A SECOND BOOK FOR STUDENTS,

AND AS

A DIGEST OF THE MOST USEFUL LEARNING  
FOR PRACTITIONERS.

BY JOSIAH W. SMITH, B.C.L., Q.C.,

RETIRED JUDGE OF COUNTY COURTS, AND A BENCHER OF LINCOLN'S INN;

(EDITOR OF FEARNE'S "CONTINGENT REMAINDERS"; AND AUTHOR OF A TREATISE ON EXECUTORY  
INTERESTS ANNEXED THERETO; EDITOR OF MITFORD'S "CHANCERY PLEADINGS";  
AND ONE OF THE CONSOLIDATORS OF THE CHANCERY ORDERS.)

*Sixth Edition.*

*(Enlarged, and embodying the alterations made by the recent Statutes.)*

BY

THE AUTHOR

AND

J. TRUSTRAM, LL.M.,

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St. John's College, Cambridge.*

IN TWO VOLUMES.

VOL. I.

LONDON:

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*Law Publishers and Bookellers.*

1884.





TO  
THE RIGHT HONOURABLE  
THOMAS, BARON TRURO,  
LORD HIGH CHANCELLOR OF GREAT BRITAIN,  
WHO  
EXERCISED HIS JUDICIAL FUNCTIONS  
WITH TRULY CONSCIENTIOUS AND LABORIOUS CARE,  
WITH DIGNITY AND URBANITY,  
AND WITH ACCURATE DISCRIMINATION AND SOUND JUDGMENT,  
THIS ATTEMPT  
TO FACILITATE THE KNOWLEDGE OF  
THE LAW OF PROPERTY CONNECTED WITH CONVEYANCING  
WAS,  
BY PERMISSION,  
MOST RESPECTFULLY INSCRIBED

1855.



## THE AUTHOR'S PREFACE TO THE SIXTH EDITION.

---

**I**N the preparation of this edition, the design has been, to add the legislative enactments and the cases or references thereto, subsequent to the publication of the fifth edition, so far as they seemed to be necessary and within the scope and 'plan of the work, as indicated in the Preface to the fourth edition (printed *infra*).

In addition to the Real Property Limitation Act, 1874; the Vendor and Purchaser Act, 1874; the Settled Estates Act, 1877; the Stat. 40 & 41 Vict. c. 33 (contingent remainders); and the Stat. 40 & 41 Vict. c. 34 (charges on hereditaments descended or devised), which were inserted in the Appendix to the last edition, the Appendix to this edition contains the following Acts: the Bills of Sale Act, 1878; the Conveyancing and Law of Property Act, 1881; the Commonable Rights Compensation Act, 1882; the Places of Worship Sites Amendment Act, 1882; the Settled Land Act, 1882; the Conveyancing Act, 1882; the Bills of Sale Act (1878) Amendment Act, 1882; the Married Women's Property Act,

1882; the Bankruptcy Act, 1883; and the Agricultural Holdings (England) Act, 1883. To facilitate reference these Statutes are inserted in the Appendix in order of date.

The alterations in the law, made by those Statutes, and, where advisable, the most important provisions of those Statutes, have been incorporated in the text of this edition. A new chapter, on the Law of Bankruptcy under the Statute of 1883, has been added. References to the respective enactments of the Statutes in the Appendix have also been inserted. And the addition of important decisions and of references thereto has been carried down to March, 1884.

The task of incorporating such alterations and provisions, and of writing the new chapter on Bankruptcy, and of inserting the references and additions, as well as of revising the copy of the work for the press, and of reading the proof sheets, has (owing to some degree of recent defectiveness of sight, and not from any other cause) been entrusted to Mr. James Trustram, LL.M., formerly MacMahon Law Student of St. John's College, Cambridge, of Lincoln's Inn, Barrister-at-law; of the Chancery Bar, and of the South-Eastern Circuit.

It has been arranged that Mr. Trustram should place in brackets the matter inserted by him.

J. W. S.

HEREFORD, *May*, 1884.

## PREFACE

TO THE FOURTH EDITION.

---

THERE are "*First-Books*" of established reputation (such as the works of Mr. Justice Blackstone, Mr. Serjeant Stephen, and Mr. Joshua Williams, Q.C.), and various general treatises connected with precedents, besides a host of works on particular subjects. But it appeared to the Author, when he first published the present work, that a well-arranged and comprehensive, a concise and yet clearly and accurately expressed *Second-Book for Students*, on Real and Personal Property, and a *Digest of the most useful learning for Practitioners*, was much needed. And this is the kind of book which he has *attempted* and laboured to supply. In the first instance, the materials were collected for his own use, under an oppressive sense of his own personal responsibility as an equity and conveyancing counsel; and the book was afterwards published in the belief that the same want which he had experienced must have been felt by others.

It was intended as a text-book of a general, but not of a merely elementary character, for the use of

*students, and as a help to practitioners upon the points most needful to be borne in mind in ordinary practice,* as distinguished from those points which may be safely and with comparative convenience left for investigation when the occasion arises.

It is extremely difficult, indeed impossible, to draw the exact line in this respect ; but such, for the most part, has been *the principle of selection*, although probably he may have inserted some matter that he might have properly omitted, and omitted some that he ought to have inserted.

Upon this principle, he has, on the one hand, excluded all antiquarian and theoretical, and generally, every other kind of disquisition,—a mass of obsolete law,—a variety of unsettled questions,—all detailed abstracts of cases,—and an immense number of points and cases which he did not consider as of general application, or necessary to be retained in the mind, if it were possible to remember them : while on the other hand, he has been especially anxious to insert those points which affect drafting, as being the points of all others the least capable of being safely left for investigation *pro re natâ* ; such, for instance, as cases of construction of common or not unfrequent occurrence. And hence many points have been inserted, not for the purpose of enabling the practitioner to form an opinion without further research, but chiefly for the purpose of putting him on his guard when engaged in preparing deeds and wills, so as to save him from mistakes into which he might

otherwise fall, or from giving rise to doubts and questions (*a*).

A *general* text-book is of course absolutely necessary for the *student*, before he can apply himself, with due profit, either to the perusal of works on particular subjects or to the practice of his profession. And if well executed by the writer, and well digested by the reader, such a book must also be of the utmost service to many, if not to most *practitioners*, by aiding them, on the one hand, in judging as to what may be regarded as settled law, and thus saving them from much needless perplexity about clear points; and by suggesting to them, on the other hand, those doubts, distinctions, rules, exceptions, and legal views, of which they cannot be ignorant without the most serious consequences; and serving, in the rapid occasions of daily practice, as a help to the attainment of accurate views, gained from the perusal and comparison of other authors, and from the modern statutes and cases. Instances are not wanting in which barristers and solicitors of long standing and inextensive practice have fallen into fatal mistakes, from the want of such assistance. They doubtless possessed the text-books on *particular* subjects, by a search of which they would have been saved from

(*a*) In the second edition the Author inserted the principal points contained in a course of Lectures delivered by him as Lecturer at the Incorporated Law Society of the United Kingdom, the general subject of which was—"Conveyancing Points upon which the Practitioner is peculiarly liable to error or inadvertency, occasioning doubt and disappointment, litigation and loss."

mistake; but what they needed, in the pressure of practice, was, that adequate general knowledge which a sound *general* text-book alone can enable the student or practitioner to store up in his mind; the points in books on particular subjects being infinitely too numerous to be remembered, and being often a dead letter to the practitioner, for want of general preparatory knowledge to lead him to examine them.

The writer, however, may observe, for the sake of those who have but recently entered the profession, that no *general* text-book, even on a much less comprehensive subject than the present, can be *implicitly* relied on by the practitioner (*a*). The author of such a general text-book is not in the position of one who has undertaken to treat of and exhaust a particular subject. The former can have only a general view of the numerous particular subjects embraced in his work, and is therefore much more liable to error and inadvertence than the latter. Nor is it safe to rely even upon a statute

(*a*) "Know, my son, that I would not have thee beleieve, that all which I have said in these bookes is law, for I will not presume to take this upon me. But of those things that are not law, inquire and learne of my wise masters learned in the law." (*Littleton*, 394 b.)—"I thought it safe for me to follow the grave and prudent example of our worthy author, not to take upon me, or presume that the reader should thinke that all that I have said herein to be law; yet this I may safely affirme, that there is nothing herein but may either open some windowes of the law, to let in more light to the student by diligent search to see the secrets of the law, or to move him to doubt, and withal to inable him to inquire and learne of the sages, what the law, together with the true reason thereof, in these cases is."—*Ch. Litt.* 395 a.



or a decided case, without consulting a text-writer upon the particular subject. A statute often embraces much less or much more than it seems to do; and the case may have been overruled, or may have been wrongly decided, or may be open to a distinction, which the perusal of a text-book might have suggested. The only *absolutely safe* course, therefore, to be adopted in practice, where a point appears to be open to any degree of doubt whatever, is, to consult some modern book upon the *specific* subject with which the practitioner is concerned, and to refer to the authorities cited therein, and the subsequent statutes and cases, under the light derived from that generally accurate knowledge of the principles, rules, points, and analogies of law, with which his mind has been stored by the study of sound text-books of a *general* character.

So far as regards the law anterior to the year 1831, the book is founded almost exclusively on certain standard works, which are in the hands of most, and should be in the hands of all members of the profession. So far as regards the law subsequent to the year 1830, it is founded partly on those works, and partly on the Statutes and Reports themselves; the writer having searched all the authorised English Reports since that period. With so wide a field before him, to have had recourse to the Reports and Statutes themselves prior to that period, would have been a labour too great to be reasonably expected of any man; and it would have been unnecessary, as the law anterior

to that time is embraced in approved text-books. And even of these, the writer has found it necessary to confine his research to a few, lest, by attempting too much, he should never be able to complete what he had commenced, or should expand his work to an undue length.

The subject being of a general character, the text-books on which the work is chiefly founded are these: Coke upon Littleton, with Hargraves and Butler's Notes; Sheppard's Touchstone, by Preston; the second volume of Blackstone's Commentaries; Cruise's Digest; Story's Equity Jurisprudence; Spence's Equitable Jurisdiction; and Burton's Compendium of the Law of Real Property (*a*). But many points have also been derived from, and many references have been made to, the Law of Vendors and Purchasers, by Lord St. Leonards (to whom the profession and the public are so deeply indebted for his Lordship's most valuable works, as well as for the various important measures which he has introduced in Parliament); the Treatise of Powers, by the same

(*a*) The 3rd edition of Cruise was used; but the references being to the titles, chapters, and sections, or paragraphs, in Cruise, they will apply to any edition. Some additional paragraphs occur in the later editions; but the titles and chapters being the same, and there being marginal notes, the points will be found without any difficulty, even in those editions. And most persons possess the third or one of the earlier editions. The references will also apply to any edition of Story or Burton. Burton's Compendium contains a very large collection of points in a small compass, and is one of the soundest books, but it relates only to real property, and was written before so many statutory changes were made and before such an enormous number of cases were decided.

most learned author; the Treatise on Mortgages (3rd edit.), by that very learned and eminent Conveyancer, the late Mr. Coote; Jarman and Bythewood's Conveyancing (3rd edit.); by Mr. George Sweet; Roper's Legacies (4th edit.), by Mr. Henry Hopley White; Fearne's Contingent Remainders and Executory Devises, with the Treatise on Executory Interests in Real and Personal Property, annexed to the 10th edition of that work, by the writer of these pages; and some other works which are referred to.

When the writer has taken any point or borrowed any idea from any other work, he has been careful to acknowledge it; and, except in some cases where he had previously consulted the authorities himself, he has simply referred to such work, leaving the reader to have recourse, for the original authorities in support of any such point of law, to the particular text-book from which it has been taken; it being the design of the writer not to render the possession of any of the books referred to less necessary than it was before, but to provide a new work to be used in addition to the existing treatises, for the purpose of supplying the want already adverted to. Indeed, besides the vast mass of obsolete and unsettled points, and of points that may be left for investigation when the occasion arises, which are contained in those books, but which have been omitted in this Compendium, there are many points which it would be advantageous, though it be not

absolutely necessary, to bear in mind, and which the writer could have inserted in these pages, from the above-mentioned text-books on particular heads of law, but he deemed it more proper to leave the reader to resort for such points to those works themselves.

How to notice the modern statutes, was a question which the writer had great difficulty in deciding. To have given in full all the enactments relating to the subject, would of course have quite overloaded the work, and swelled it out to a very large size. Again, to have noticed all the enactments briefly appeared to be only of use in apprizing the reader that there are enactments of such a general purport and effect, without giving him an accurate view of those enactments. A third mode therefore has been adopted, namely to treat the Statute Law in the same way as the unwritten law—that is, to notice such only of the enactments as appeared necessary to be borne in mind, as distinguished from those which may be left for investigation *pro re natâ*, and generally (as the only thoroughly satisfactory course) to give verbatim the enactments so noticed. From this, however, he has excepted certain very lengthy Acts, which all practitioners possess, and the effect only of which he has given.

In some instances where the words of a statute have been given verbatim, the writer has prefixed to them an abridged statement, which may serve as some help to the student.

As the work has swelled out to a greater size than was contemplated, the decisions upon the modern statutes, being easily referred to when required, are generally omitted. They are collected in the works of Lord St. Leonards and Mr. Shelford on the New Statutes, and in Chitty's Collection of Statutes.

As this is a Compendium of the *Law* of Property, connected with conveyancing, points of practice or usage which have not been the subject of enactment or decision are generally omitted; and points of practice which have been the subject of enactment or decision are also omitted, where they may be safely left to be investigated for the occasion. They will be found in the works of Lord St. Leonards, in Jarman and Bythewood's Conveyancing by Mr. George Sweet, and in the writings of Mr. Preston, etc.

The student is recommended to read through this Compendium twice at the least, and then mentally to engraft upon it, as it were, additional portions of the works referred to, in illustration and enlargement of the knowledge these pages are intended to furnish.

It is divided into Four Parts :—

Part I. Of the several Kinds of Things constituting the subjects of conveyancing.

Part II. Of the several Kinds of Interests in Things constituting the subjects of conveyancing.

Part III. Of the Title to Things constituting the subjects of conveyancing.

Part IV. Of certain Persons and Miscellaneous Heads of Law connected with conveyancing (*a*).

Some of the chapters or sections have a scanty appearance. But this has arisen partly from the principle of selection above adverted to, and partly from the endeavour to devise as accurate and perspicuous an arrangement of the subject as possible, and one that might be convenient for the purpose of annotation by the reader; which has produced a greater subdivision than that which might otherwise have been adopted.

To select, abridge, arrange, combine, and digest, and, in very many instances, to define, correct, qualify, harmonise, deduce, and distinguish, has involved the perusal of many thousands of pages of text-books, the search of a very great number of volumes of reports, and some years of perplexing thought and arduous labour.

That a work relating to so vast a subject, and comparatively in so small a compass, should not be liable to the charge of a number of omissions and inadvertences, can hardly be reasonably expected. And therefore, although the manner in which his other labours in legal authorship have been received by several of the Judges and of the leading Members of the Bar encouraged the writer to make

(*a*) For a concise work on the Law of Property, *not* connected with Conveyancing, the reader is referred to the Author's "Manual of Common Law," founded on about seventy text-books, and the subsequent statutes and cases, and comprising the fundamental principles, and the points most usually occurring in daily life and practice (9th edition).

the present attempt to facilitate a knowledge of the Law of Property, so far as it primarily bears upon Conveyancing, and consequently is also connected with Equity and Common Law, and although the time expended upon the undertaking has far exceeded that which a book upon any *particular* subject would have required, yet it is with the utmost diffidence that he ventured to submit the present work to the Profession. Though it may fall far short of what he, so far as the time at his command would permit, has endeavoured to make it, yet he trusts it is calculated to prove a valuable *nucleus of that generally applicable and useful, and therefore really practical learning*, which it is needful for every one to appropriate to himself, and around which he may readily agglomerate such further “amiable and admirable secrets of the law” (a) as he may think expedient and possible to be stored up in his mind. And the Author has had the satisfaction of receiving ample testimony to its usefulness, whether as a book to be read and got up, or as a book to be referred to, for the rapid exigencies of daily practice.

J. W. S.

January, 1870.

(a) Co. Litt. 71 a.





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(a) It was difficult to find an appropriate place for this subject. But this seemed as proper a place as any other, and practically the most convenient.

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## ADDENDA ET CORRIGENDA.

### INTERPRETATION CLAUSE IN THE STAT. 1 VICT. C. 26.

By the stat. 1 Vict. c. 26, s. 1, it is enacted, "that the words and expressions hereinafter mentioned, which in their ordinary signification have a more confined or a different meaning, shall in this Act, except where the nature of the provision or the context of the Act shall exclude such construction, be interpreted as follows; (that is to say,) the word 'will' shall extend to a testament, and to a codicil, and to an appointment by will or by writing in the nature of a will in exercise of a power, and also to a disposition by will and testament or devise of the custody and tuition of any child by virtue of an Act passed in the 12th year of the reign of King Charles the Second, intituled *An Act for taking away the Court of Wards and Liveries, and Tenures in capite and by Knights Service, and Purveyance, and for settling a revenue upon His Majesty in lieu thereof*, or by virtue of an Act passed in the Parliament of Ireland in the 14th and 15th years of the reign of King Charles the Second, intituled *An Act for taking away the Court of Wards and Liveries and Tenures in capite and by Knights Service*, and to any other testamentary disposition; and the words 'real estate' shall extend to manors, advowsons, messuages, lands, tithes, rents, and hereditaments, whether freehold, customary freehold, tenant right, customary or copyhold, or of any other tenure, and whether corporeal, incorporeal, or personal, and to any undivided share thereof, and to any estate, right, or interest (other than a chattel interest) therein; and the words 'personal estate' shall extend to leasehold estates and other chattels real, and also to moneys, shares of Government and other funds, securities for money (not being real estates), debts, choses in action, rights, credits, goods, and all other property whatsoever which by law devolves upon the executor or administrator, and to any share or interest therein; and every word importing the singular number only shall extend and be applied to several persons or things as well as one person or thing; and every word importing the masculine gender only shall extend and be applied to a female as well as a male." (See footnote (a) on next page).

Will.

"Real estate."

"Personal estate"

Singular.

Masculine.

## INTERPRETATION CLAUSE IN THE STAT. 22 &amp; 23 VICT. C. 35.

By the stat. 22 & 23 Vict. c. 35, s. 25, it is enacted that "in the construction of the previous provisions in this Act the term 'land' shall be taken to include all tenements and hereditaments, and any part or share of or estate or interest in any tenements or hereditaments of what tenure or kind soever; and the term 'mortgage' shall be taken to include every instrument by virtue whereof land is in any manner conveyed, assigned, pledged, or charged as security for the repayment of money or money's worth lent, and to be reconveyed, re-assigned, or released on satisfaction of the debt; and the term 'mortgagor' shall be taken to include every person by whom any such conveyance, assignment, pledge, or charge as aforesaid shall be made; and the term 'mortgagee' shall be taken to include every person to whom or in whose favour any such conveyance, assignment, pledge, or charge as aforesaid is made or transferred: the term 'judgment' shall be taken to include registered decrees, orders of Courts of Equity and Bankruptcy, and other orders having the operation of judgments" (a).

- Par. 146, in marginal note, *after* "created" *insert* "by."  
 " 273, n. (a) *for* "Hughe" *read* "Hughes."  
 " 686, n. (b), and par. 687, n. (c), *for* "113th" *read* "13th."  
 " 1092 b, n. (a) *after* "Bellamy" *add* "and Metropolitan Board of Works."  
 " 1291, in third marginal note, *for* "heir" *read* "heira."  
 " 1540, n. (e), *for* "§" *read* "s."  
 " 1615, n. (c), *for* "V.R." *read* "W.R.," and *add* "L.R. 25 Ch. D. 646."  
 Page 833, n. (a), line 3, *for* "24" *read* "25."  
 Par. 3155, last line, *for* "23 and 24" *read* "13 and 14."  
 " 3349, marginal note, *for* "Who aliens are" *read* "Who are aliens."  
 Page 1476, in schedule, line 8 from bottom, *for* "benefice, or" *read* "benefice) or."

*Note.*—The printer, in some instances, altered the word "femme" into "femme," after the sheets were returned for press.

(a) As the provisions of these two Acts necessarily lie scattered about in this work, this seemed as convenient a place as any other for these interpretation clauses.



# INTRODUCTION

# INTRODUCTORY ANALYSIS.

In the following pages it is proposed to consider—

## I. THE SEVERAL KINDS OF THINGS CONSTITUTING THE SUBJECTS OF CONVEYANCING.

- { 1. Things Real.
- { 2. Things Personal.
  - { 1. Chattels Real.
  - { 2. Chattels Personal.
- { 1. Things Corporeal.
- { 2. Things Incorporeal, as
  - { 1. Annuities.
  - { 2. Rents.
  - { 3. Advowsons.
  - { 4. Tithes.
  - { 5. Commons.
  - { 6. Franchises or Liberties.
  - { 7. Ways, etc.

## II. THE SEVERAL KINDS OF INTERESTS IN THINGS CONSTITUTING THE SUBJECTS OF CONVEYANCING [some of which depend on or are affected by (1) Conditions, (2) Limitations].

*First, in Things Real.*

- 1st. { 1. Freehold Interests (so termed in reference to tenure).
  - { 1. Interests in hereditaments of common or ordinary Socage tenure.
  - { 2. Interests in hereditaments of Gavelkind tenure.
  - { 3. Interests in hereditaments of Burgage tenure.
  - { 4. Interests in hereditaments of Grand Sergeanty tenure.
  - { 5. Interests in hereditaments of Petit Sergeanty tenure.
  - { 6. Interests in hereditaments of Frankalmoign tenure.
- 2. Copyhold Interests.
  - { 1. Ordinary Copyholds.
  - { 2. Free Copyholds, or Customary Freeholds, including Antient Demesne.
- 2nd. { 1. Freehold Interests (so termed in reference to duration).
  - { 1. Freeholds of Inheritance.
    - { 1. Estates in Fee simple.
    - { 2. Limited Fees.
      - { 1. Base or Qualified Fees.
      - { 2. Fees subject to a condition subsequent or conditional limitation.
      - { 3. Conditional Fees at Common Law.
      - { 4. Fees Tail.
  - { 2. Freeholds not of Inheritance.
    - { 1. Estates for Life, specifically so called.
    - { 2. Estates tail, after possibility of issue extinct.
    - { 3. Estates by the Curtesy.
    - { 4. Estates in Dower, Freebench, and Jointure.
- Interests less than Freehold.

- 1. Estates for Years.
  - 2. Estates at Will.
  - 3. Interests by Sufferance.
  - 4. Chattel Interests created for special purposes.
- 3rd. {
  - 1. Interests in Severalty.
  - 2. Interests in Community.
    - 1. In Joint Tenancy.
    - 2. By Entireties.
    - 3. In Coparcenary.
    - 4. In Common.
- 4th. {
  - 1. Merely Legal Interests : and herein of Uses.
  - 2. Merely Equitable Interests or Trusts.
  - 3. Both Legal and Equitable Interests.
    - 1. Vested Interests or actual Estates.
      - 1. Present Vested Interests.
      - 2. Future Vested Interests.
        - 1. Vested Remainders.
        - 2. Reversions.
    - 2. Executory Interests, or Interests only, as distinguished from actual Estates, whether created by executory devise, or by executory limitation by way of use.
      - (a) {
        - 1. Certain.
        - 2. Contingent.
      - (b) {
        - 1. Contingent Remainders.
        - 2. Springing Interests.
        - 3. Alternative Interests.
        - 4. Interests augmented in a given event.
        - 5. Interests diminished in a given event.
        - 6. Interests under Conditional Limitations.
    - 3. Rights of Entry or Action.
    - 4. Mere Possibilities.
    - 5. Mere Adverse Possessions.
    - 6. Expectancies of heirs apparent or heirs presumptive.
    - 7. Powers.
    - 8. Charges.
    - 9. Liens.
  - 5th. {
    - 1. Absolute or Indefeasible Interests.
    - 2. Defeasible Interests : and herein of Mortgages of real property, and interests under Statutes Merchant, Statutes Staple, Recognisances, Judgments, Decrees, Orders, and Rules of Court, and Elegit.
  - 6th. {
    - 1. Absolute or Indefeasible Interests.
    - 2. Defeasible Interests : and herein of Mortgages of real property, and interests under Statutes Merchant, Statutes Staple, Recognisances, Judgments, Decrees, Orders, and Rules of Court, and Elegit.

*Secondly, in Things Personal (a).*

- 1st. { 1. Absolute or Unlimited Interests.  
2. Limited Interests.
- 2nd. { 1. Interests in Severalty.  
2. Interests in Community.  
    { 1. In Joint Tenancy.  
    { 2. By Entireties.  
    { 3. In Common.
- 3rd. { 1. Merely Legal Interests.  
2. Merely Equitable Interests.  
3. Both Legal and Equitable Interests.
- 4th. { 1. Vested Interests.  
    { 1. Present Vested Interests.  
    { 2. Future Vested Interests, such as Vested quasi  
    {     Remainders and Reversions, both of which are  
    {     frequently termed Reversionary Interests.  
2. Executory Interests.  
    (a) { 1. Certain.  
    { 2. Contingent.  
    (b) { 1. Contingent quasi Remainders.  
    { 2. Springing Interests.  
    { 3. Alternative Interests.  
    { 4. Interests augmented in a given event.  
    { 5. Interests diminished in a given event.  
    { 6. Interests under Conditional Limitations.  
3. Choses in action.  
4. Expectancies of next of kin.  
5. Powers.  
6. Charges.  
7. Liens.
- 5th. { 1. Absolute and Indefeasible Interests.  
2. Defeasible Interests: and herein of Mortgages of personal property.

III. THE TITLE TO THINGS CONSTITUTING THE SUBJECTS OF CONVEYANCING.

1. Marriage.
2. Descent, Succession, and Administration.
3. Escheat.
4. Occupancy.
5. Alluvion and Dereliction.
6. Prescription.
7. Adverse Possession, and the Operation of the Statutes of Limitation.
8. The Operation of the Land Registry Act, 1862, the Declaration of Title Act, 1862, and the Land Transfer Act, 1875.
9. Forfeiture.
10. Bankruptcy.
11. Alienation.

(a) Although a separate analysis is here given of Interests in Things Personal as connected with conveyancing, yet the Law of Personal Property is not separately discussed in the following work, but in connection with the Law of Real Property.

1. By Mere Written Agreement.

2. By Deed.

*Those Deeds which are termed Conveyances are—*

1. Common Law Conveyances.

1. Feoffments.
2. Gifts.
3. Grants.
4. Bargains and Sales.
5. Leases and Underleases.
6. Exchanges.
7. Partitions.
8. Releases.
9. Confirmations
10. Surrenders.
11. Assignments.
12. Defeasances.
13. Disclaimers.

2. Statutory Conveyances, which (without reckoning feoffments and bargains and sales, when made to uses) are—

1. Covenants to stand seised.
2. Deeds of lease and release.
3. Statutory releases.
4. Statutory grants.
5. Deeds to lead and declare uses.
6. Deeds of revocation of uses.
7. Deeds of appointment under powers.
8. Leases under powers.
9. Bargains and sales under the Fines and Recoveries Abolition Act.
10. Concise Conveyances and Leases under stats. 8 & 9 Vict. cc. 119, 124, and 25 & 26 Vict. c. 53. Also Statutory Mortgages, and Short Forms of Deeds under stat. 44 & 45 Vict. c. 41.

*Deeds other than Conveyances. Such are—*

1. Deeds of covenants or agreement.
2. Bonds.
3. Declarations of trust.

*Deeds when considered with reference to the purpose to be effected by them, are—*

1. Purchase deeds.
2. Mortgage deeds.
3. Marriage Settlements.
4. Deeds of Indemnity.
5. Composition or Creditors' Deeds, etc.

3. By Matter of Record.

1. Private Act.
2. Royal Grant.
3. Fine.
4. Recovery.

4. By Voluntary Grant and Admittance, or by Surrender and Admittance, or by Bargain and Sale and Admittance, or by Recovery, in the case of Copyholds.

5. By Will.

## IV. CERTAIN PERSONS AND MISCELLANEOUS HEADS OF LAW CONNECTED WITH CONVEYANCING.

1. *Certain Persons connected with Conveyancing—*

- 1. Executors and Administrators.
- 2. Trustees.
- 3. Married Women.
- 4. Infants.
- 5. Illegitimate Children.
- 6. Persons of unsound mind.
- 7. Aliens.
- 8. Corporations.

2. *Some Miscellaneous Heads of Law connected with Conveyancing—*

- 1. Waste.
- 2. Merger.
- 3. Conversion.
- 4. Election.
- 5. Satisfaction.

## INTRODUCTORY OUTLINE.

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IN explanation of the foregoing Analysis, and by way of further introduction to the present Compendium, the following Outline (a) of the subject may be of use to the student :—

I. *With regard to the several kinds of THINGS constituting the Subjects of Conveyancing*, it will have been seen that they are either REAL or PERSONAL. Things real are those which are permanent and immovable ; such as land and buildings. Of things personal, some are termed CHATTELS REAL, consisting of estates for years, and other interests in things real which in early times were of short duration ; while other things personal are termed CHATTELS PERSONAL, because they do not concern real estate, but, for the most part, are connected with, or may accompany, the person of the owner ; such as money, garments, furniture, cattle.

Things are further divided into things CORPOREAL, which are objects of sense, and things INCORPOREAL, which are objects of the mind alone. Thus, land is a corporeal thing. But an ANNUITY or a right to a yearly payment, is an incorporeal thing ; as also is a RENT, which is a right to a periodical payment or render, in respect of, or as a charge on land ; although the money or other thing, which is the fruit of such annuity or rent, is of a corporeal nature. ADVOWSONS and PRESENTATIONS, which are rights of present-

(a) For more formal and precise definitions, the student is referred to the body of the work.

ing to a benefice (the former, from time to time, and the latter at a particular time) ; and TITHES, or a right to a tenth of the increase, were incorporeal things ; although the rectory, to the possession of which the advowson or presentation confers the title, and the money which was payable in respect of the right to a tenth of the increase, are corporeal. So, a right of taking or using some portion of that which another's lands, woods, water, etc., produce, which is called COMMON, is an incorporeal thing ; though the produce so taken or used is corporeal. And of the same incorporeal nature are FRANCHISES or LIBERTIES, which are royal privileges in the hands of a subject ; and WAYS, or private rights of going over ground belonging to other persons.

Such things, whether real or personal, corporeal or incorporeal, as, on the death of the person entitled to them, pass to his heir, are termed HEREDITAMENTS.

II. *With regard to the several kinds of INTERESTS in Things constituting the Subjects of Conveyancing*, sometimes estates or interests are only to arise in a given event, and are therefore said to depend on a CONDITION PRECEDENT : as where a man grants that if a particular event should happen, A. shall have an estate. Every kind of interest is subject to a GENERAL LIMITATION, that is, a limit or bound, either by express words or by construction of law, which denotes the general class or denomination, in point of quantity or duration, to which such interest belongs : as to A. and his heirs, or to A. for life, for years, or at will. But sometimes interests are made determinable in a given event, before they have endured as long as, according to the general limitation, they might have endured but for such event. When this determinable quality forms an additional original limit or bound of the estate or interest, it is called a SPECIAL OR COLLATERAL LIMITATION : as when



an estate is granted to A. until, etc., or whilst or if, etc. : though the term limitation is frequently used to denote the entire sentence creating and actually or constructively marking out the limits or bounds of an estate or interest. When the determinable quality is not an original limit, but is entirely independent of the measure originally assigned to an estate or interest, it forms either a condition subsequent, or a conditional limitation, or a condition of cesser and acceleration. Thus, when the effect of such a condition is simply to defeat an estate or interest, without creating another estate or interest in the room of the one so defeated, the condition is said to be a **CONDITION SUBSEQUENT**, properly so called : as where an estate is granted to A., subject to a condition, that if a particular event should happen, the estate shall cease, and the land revert to the grantor. But when the condition, while it involves the destruction of one estate or interest, before it has endured as long as it might have endured but for such condition, provides for the creation of another estate or interest in the room of the estate or interest so destroyed, such condition is then of a mixed character,—partly destructive and partly creative or accelerative,—subsequent in one respect and precedent in another,—and is either a **CONDITIONAL LIMITATION** or a **CONDITION OF CESSER AND ACCELERATION**: as where an estate is granted to A., but with a proviso, that if a particular event happen, such estate shall cease, and the land shall go to B., to whom no estate is limited after the estate to A. ; or where an estate is limited to A. for life, and after his death to B., but with a proviso that if A. do a certain act, his estate shall cease, and the land shall go at once to B. The first is a conditional limitation : the second a condition of cesser and acceleration.

All landed property is supposed to be *held* of some lord or superior. Hence, all kinds of land as well as

buildings, are called **TENEMENTS**, the possessors thereof **TENANTS**, and the manner of possession **TENURE**.

1. Things real are either of freehold or of copyhold tenure.

Those of **FREEHOLD TENURE** are such as are held under the ordinary deeds of assurance. And of freehold tenures, there are six species : **COMMON SOCAGE**, **GAVELKIND**, **BURGAGE**, **GRAND SERGEANTY**, **PETIT SERGEANTY**, and **FRANK-ALMOIGN**. The generality of freeholds are of common socage tenure, except in Kent, where gavelkind tenure prevails.

Things real of **COPYHOLD TENURE** are such as are held of the lord of a manor by copy of the court rolls of such manor. A **MANOR** is a district which formerly belonged exclusively to a lord or owner, who resided there, and kept in his own hands so much land in that district as was necessary for the use of his household, called the demesnes of the manor, and distributed a part of the rest (except what was termed the waste and reserved for roads and commons) among certain free tenants, who held by deed under rents and free services, and whom the present free copyholders or customary freeholders represent ; and the remainder among villeins or serfs, who held the same at the will of the lord, and from whom have sprung the ordinary copyholders of manors, who now hold only nominally at the will of the lord, but according to the custom of the manor ; having, by a series of immemorial encroachments on the lord, established a customary right to those estates which before were held really and absolutely at the lord's will (a). **ORDINARY COPYHOLDS** are expressed to be held at the will of the lord of the manor ; but **FREE COPYHOLDS** or **CUSTOMARY FREEHOLDS**, including lands in **ANTIENT DEMESNE**, which are held of manors formerly in the possession of the Crown, are not expressed to be so held.

(a) See 2 Bl. Com. 90—96 ; 1 Cru. D. Prelim. Dissert. c. 3, § 3—7.

In the case of the former, however, as already intimated, the will of the lord is ascertained and defined, by the custom of the manor; and, in general, ordinary copyholders may have estates of the same duration and certainty as freeholders.

2. When the term freehold is applied to the hereditaments themselves, it denotes their tenure, and is opposed to copyhold. But when the term **FREEHOLD** is applied to an ESTATE OR INTEREST IN AN HEREDITAMENT, that is, to the connection which subsists between an hereditament or thing capable of being inherited and the owner of such hereditament, the term freehold then denotes the duration of such estate or interest, and is opposed to an estate or interest less than freehold. Thus, estates or interests in real property, whether of freehold or of copyhold tenure, when considered with reference to their duration, are either **FREEHOLD OR LESS THAN FREEHOLD**. And estates or interests of freehold duration are either **FREEHOLDS OF INHERITANCE OR FREEHOLDS NOT OF INHERITANCE**. An estate or interest which is not confined to a given number of years or at will only, whether it be an estate descendible to a person's heirs generally or to a particular class of heirs, or for the life of himself or another person, is a freehold as regards duration: whereas, if it is confined to a given number of years, however many they may be, or if it is at will only, it is but a chattel interest. But no such distinction exists in the case of personalty; for every interest in personalty is but a chattel interest.

**FREEHOLDS OF INHERITANCE** are either estates in **FREE SIMPLE**, briefly termed estates in fee, which are absolute estates of inheritance descendible to the heirs general of the person to whom such estates are given, whether they be his children or other relatives; or **LIMITED FEES**, which are estates of inheritance of a restricted kind. Limited fees are of four kinds: **BASE OR QUALIFIED FEES**, which

are descendible to the heirs general, but subject to a limitation, restriction, or qualification ; FEES SUBJECT TO A CONDITION, SUBSEQUENT, OR CONDITIONAL LIMITATION ; FEES CONDITIONAL AT THE COMMON LAW, which are estates descendible to the heirs of the bodies of the persons to whom such estates are given, in hereditaments not entailable ; and FEES TAIL, which are estates descendible in like manner, in hereditaments entailable. Fees tail, or estates tail, are either ESTATES TAIL GENERAL, that is, descendible to all the heirs of the body of a sole tenant in tail, or all the heirs of his body of a certain sex ; or ESTATES TAIL SPECIAL, that is, descendible only to the heirs of the bodies of a particular married couple who are tenants in tail, or only to the heirs of the body of a sole tenant in tail by a particular person. And when estates tail, whether general or special, are only descendible to a particular sex, they are called ESTATES TAIL MALE, or ESTATES TAIL FEMALE, as the case may be.

FREEHOLDS, NOT OF INHERITANCE, are of several kinds : estates for life specifically so called ; estates tail after possibility of issue extinct ; estates in dower, freebench, or jointure ; and estates by the curtesy. Some ESTATES FOR LIFE are not for the life or lives of the grantees or devisees, but for the life or lives of some other person or persons ; in which case they are termed ESTATES POUR AUTRE VIE, and such other person or persons cestui que vie or cestuis que vie. An ESTATE TAIL AFTER POSSIBILITY OF ISSUE EXTINGUISHED arises where one of two tenants in special tail dies, or the person by whom alone a sole tenant in special tail can have issue inheritable under the entail dies, and in either case there happens to be a failure of issue so inheritable under the entail. An ESTATE BY THE CURTESY OF ENGLAND is an estate for life, which a husband takes, on the death of his wife, in her lands or tenements, if he has had issue by her capable of inheriting them. DOWER is an estate

for life, to which a woman becomes entitled, on the decease of her husband, in one-third of his real property, which any issue she might have had could have inherited ; unless such estate is prevented, barred, or lost. One mode in which it may be barred, is by a legal JOINTURE, which is an estate for the life of the wife, or some greater estate, to commence after her husband's decease, in lieu of her dower. FREEBENCH in copyhold answers to dower in freeholds ; but in some manors it consists of the whole or of half, or some other proportion than a third, of the husband's lands and tenements, and sometimes it is not for life.

INTERESTS LESS THAN FREEHOLD, which are termed CHATTEL INTERESTS, are of four kinds : ESTATES OR TERMS FOR YEARS, of which nature are all estates for a given number of years, or from year to year, or for one year, or for any less period denoted by one of the ordinary divisions of time ; ESTATES AT WILL, which endure so long as both parties choose ; INTERESTS BY SUFFERANCE, which arise when a person retains possession longer than he has any title to retain it ; and CHATTEL INTERESTS CREATED FOR SPECIAL PURPOSES.

3. Some estates or interests are in SEVERALTY ; others in COMMUNITY. Of the latter there are four kinds : (1) An estate in JOINT TENANCY, in real or personal property, which arises by act of the parties, and in which each of the owners is seised or possessed per my et per tout, *i.e.*, both by his proportionate share and by the whole ; in consequence whereof there is a benefit of survivorship between them. (2) An estate by ENTIRETIES, which arises when real or personal property is given to husband and wife, who do not take by moieties, but each has the entirety. (3) An estate in COPARCENARY, in real property, which accrues by descent to two or more co-heiresses at common law, or two or more co-heirs by custom, and their represen-

tatives, and in which the owners take per my only, and not per tout. (4) An estate in **COMMON**, in real or personal property, in which the owners take by act of the parties (and not by act of law, as by descent), and in which they take per my only, and not per tout.

4. Again, interests may be **MERELY LEGAL**, that is, possessory, as opposed to beneficial; or **MERELY EQUITABLE**, that is, beneficial, as opposed to possessory; or **BOTH LEGAL AND EQUITABLE**, that is, both possessory and beneficial. Legal interests may arise in various ways. One of these is, by a limitation of **USES**, or expressing the uses to or for which an estate is conveyed. Since the statute of Henry VIII., called the Statute of Uses, those uses upon which that statute operates are thereby converted into legal estates, as opposed to **TRUSTS**, which are equitable estates.

5. Some interests are clothed with the ownership of which the land or other subject of property is susceptible, while other interests are of a more imperfect character, being interests existing apart from and collateral to that ownership. Interests, in the widest sense of the term (in which it is used to denote that connection which subsists between a person and a subject of property), when considered in this relation, may be divided into nine different species: vested interests, executory interests, rights of entry or action, mere possibilities, mere adverse possessions, expectancies of heirs apparent or heirs presumptive, powers, charges, liens.

A **VESTED INTEREST** or actual estate is the actually acquired ownership, or a portion thereof; and is either present or future. One kind of vested interest is called a vested remainder. When, after a gift of a portion of ownership, the remaining portion or the proximate part of the remaining portion of ownership is also disposed of by

the same instrument, it is termed a **REMAINDER**. Another kind of vested interest is called a **REVERSION**. Thus, where one portion or several portions of the ownership is or are disposed of, but the more remote portion is not disposed of, this portion so undisposed of is termed a reversion. So that in the case of a gift to A. for life, and then to B. in fee simple; or to A. for life, and then to B. for life or in tail, and then to C. in fee simple; the estates given to B. and C. are remainders. But in the case of a gift to A. for life or in tail, by a tenant in fee simple, without any further disposition, all the ownership of which the land is susceptible, after the death of A. or his death and failure of heirs of his body, being undisposed of, continues in the grantor or testator, and constitutes a reversion in fee.

An **EXECUTORY INTEREST**, which may be either certain or contingent, is a portion of ownership to be acquired at a future time or in a future event, whether certain or contingent. There are several kinds of executory interests. Such are contingent remainders, springing interests, interests under augmentative limitations, interests under diminuent limitations, alternative interests, and interests under conditional limitations. A **CONTINGENT REMAINDER** is a remaining portion or the proximate part of a remaining portion of ownership, the acquisition whereof is made to depend on a contingency: as in the case of a gift to the use of A. till C. returns from Rome, and after such return then to the use of C. A **SPRINGING INTEREST** is an interest to arise at a future time, or on a future event, whether certain or contingent, without reference to and without affecting any other interest at all, or in the case of real estate, any other interest of the measure of freehold; as where a gift is made to the use of A. on the return of B. from Rome, without any preceding gift. An **ALTERNATIVE INTEREST** is an interest to arise by way of substitution, in

case of a preceding interest never taking effect : as where a gift is made to A. for life ; and if he have a child or children, then to such a child or children in fee ; but if he have no child, then to B. in fee. An INTEREST INCREASED IN A GIVEN EVENT, OR AN INTEREST UNDER AN AUGMENTATIVE LIMITATION (as it may be called for want of any other specific term), is an interest to arise on a condition by way of increase of an existing interest. An INTEREST DIMINISHED IN A GIVEN EVENT, OR AN INTEREST UNDER A DIMINUTENT LIMITATION (as it may be called for want of any other specific term), is an interest to arise on a condition, in lieu of a higher interest given by the same instrument. And an INTEREST UNDER A CONDITIONAL LIMITATION is one which is to take effect in defeasance of a prior interest : as in the case of a gift to the use of A. for life ; but if B. return from Rome, then immediately to the use of B. for life.

RIGHTS OF ENTRY OR ACTION ; MERE POSSIBILITIES of the reverter of an estate or of the accruer of a right of entry for recovery of an estate, as distinguished from executory interests and actual rights of entry ; mere ADVERSE POSSESSIONS by persons who have wrongfully acquired possession ; EXPECTANCIES, or hopes of succession of heirs presumptive or heirs apparent ; POWERS, or rights reserved to or conferred upon a person, of doing some act in the law ; CHARGES, or sums of money payable out of an estate ; and LIENS, or holds upon estates for the satisfaction of claims attaching thereto ; are also interests, in the widest sense of the term already mentioned, which are collateral to the seisin, property, or ownership.

6. Lastly, interests in things real are either ABSOLUTE OR INDEFEASIBLE interests, or interests which are DEFEASIBLE, as being mere securities, or being liable to divestment by an action, or to a premature determination. Of defea-



sible interests by way of security, some are termed **MORTGAGES**, which are securities created by means of a transfer by a debtor to his creditor of the legal or equitable ownership, subject to be defeated on the discharge of the debt. There are also defeasible interests by way of security, by **STATUTE MERCHANT**, **STATUTE STAPLE**, and **RECOGNISANCE**, which are bonds acknowledged before certain legal functionaries, for securing payment of debts, and upon which, in case of default of payment, there arises a right to have and hold the lands of the debtors, for the recovery of the debts. And other securities are created by **JUDGMENTS**, **DECREES**, **ORDERS**, and **RULES OF COURT**, and by **ELEGIT**, which is a writ under which the lands of a debtor are delivered to the creditor for the recovery of the debt.

**INTERESTS IN THINGS PERSONAL** are either absolute or unlimited, or only limited, according as they embrace the entire ownership, or only a part of it. We have seen that they may be either in severalty or in community, but that in them there are only three sorts of interests in community—in joint tenancy ; by entireties ; and in common. Interests in things personal, like those in things real, may be merely legal or merely equitable, or both legal and equitable. Again, when considered in relation to the being clothed with the actual ownership or being collateral thereto, interests in things personal may be divided (as shown in the foregoing Analysis) into vested and executory interests ; choses in action, which are things to which a person has only a bare right, enforceable by legal proceedings ; expectancies, or hopes of succession of next of kin ; and powers, charges, and liens. And interests in personalty are also divisible into absolute or indefeasible and defeasible interests.

### III. *With regard to the TITLE to Things constituting the*

*Subjects of Conveyancing*, this signifies the means by which a person has a right to them. The modes of acquiring property are : 1. MARRIAGE. 2. DESCENT or hereditary succession to real property ; SUCCESSION, or the devolution or transmission of real or personal property, on the death of, and from, persons in a corporate character, to their successors ; and ADMINISTRATION, or the distribution of personal property on the death of the owner. 3. ESCHEAT, or the reverting of land to the original grantor or lord of the fee, where a legal tenant of the fee dies without heirs, and without having disposed of it, or was attainted for treason or murder. 4. OCCUPANCY, or the taking possession of an estate which has no owner. 5. ALLUVION, or the washing up of sand or earth ; and DERELICTION, or the receding of water, so as to leave land dry. 6. PRESCRIPTION, or usage. 7. ADVERSE POSSESSION, and the operation of certain Statutes, called STATUTES OF LIMITATION, which, by setting a limit to the time within which a person shall be allowed to enforce his right to property against another person, serve to confer a title on the latter in case of the former failing to institute proceedings to enforce his right within the prescribed time. 8. The OPERATION OF THE LAND REGISTRY ACT, 1862, AND THE DECLARATION OF TITLE ACT, 1862, AND THE LAND TRANSFER ACT, 1875, by which an indefeasible title or root of title may be obtained in favour of or by a purchaser for value. 9. FORFEITURE, or the loss of property as a punishment for some illegal act or negligence. 10. BANKRUPTCY, or LIQUIDATION. 11. ALIENATION.

One mode of alienation is by MERE WRITTEN AGREEMENT ; another is by DEED, that is, by a writing sealed and delivered ; a third mode is by MATTER OF RECORD ; a fourth, in the case of copyholds, is by VOLUNTARY GRANT, SURRENDER, OR BARGAIN AND SALE, FOLLOWED BY ADMITTANCE, OR BY RECOVERY ; and a fifth mode is by WILL.

Every person, to become legal owner of copyholds, must

be admitted tenant of the manor, and every such ADMITTANCE must be entered on the court rolls of the manor. Sometimes such admittance is grounded on a VOLUNTARY GRANT by the lord, where the land was in his own hands, and he might have retained it if he had thought proper, but he chooses to make a grant of it. At other times such admittance is grounded on a SURRENDER to the lord, or a BARGAIN AND SALE by a copyholder, according to the nature of the interest of the party alienating.

Those DEEDS which are termed CONVEYANCES may be arranged into two great classes : CONVEYANCES AT COMMON LAW, that is, conveyances which derive their effect from the unwritten law ; and STATUTORY CONVEYANCES, which derive their efficacy from the operation of an Act of Parliament. Of the former there are about thirteen kinds : (1) FEOFFMENTS, which consist of deeds perfected by livery of seisin, that is, delivery of possession. (2) GIFTS, which are feoffments whereby an estate tail is created. (3) GRANTS, which are conveyances of incorporeal hereditaments. (4) BARGAINS AND SALES, which are contracts for money or money's worth. (5) LEASES, which are conveyances for some less interest than the lessor has in the premises, whether for life, for years, or at will ; and UNDERLEASES, which are leases made by a person who has himself only a leasehold interest. (6) EXCHANGES. (7) PARTITIONS. (8) RELEASES, whereby rights are extinguished, or estates or interests are conveyed to persons who have already some estate or interest in possession. (9) CONFIRMATIONS, whereby conditional or voidable estates are made absolute or unavoidable, or whereby particular estates are increased. (10) SURRENDERS, whereby estates for life or years are yielded up to him who has a higher or equal estate in reversion or remainder. (11) ASSIGNMENTS, which are total alienations of chattels, real or personal, not by way of surrender. (12) DEFEASANCES, which are of the nature of

condition subsequent, except that they are contained in a distinct deed. (13) **DISCLAIMERS**, which are deeds of renunciation of a grant, devise, or bequest.

Not reckoning deeds which existed at common law, and when made to uses operate under the Statute of Uses, there are about ten kinds of **GENERAL STATUTORY CONVEYANCES**: (1) **COVENANTS TO STAND SEISED**, whereby a person covenants that he will stand seised, that is, possessed, to the use of his wife or some relative. (2) **DEEDS OF LEASE AND RELEASE**, which consist, first, of a lease, or rather a bargain and sale for a year, conferring on the bargainee the use of the land for that time, which the Statute of Uses converts into a legal estate; and, secondly, of a common law release of the reversion to the bargainee—a contrivance resorted to in order to effect the transfer of real property in a more secret manner than by feoffment, which required the notoriety of livery, or than by bargain and sale, to which enrolment was requisite. (3) **STATUTORY RELEASES**, which are substituted by the stat. 4 Vict. c. 21, for leases and releases. (4) **STATUTORY GRANTS**, which are simply grants to which the stat. 8 & 9 Vict. c. 106, s. 2, has given the effect of passing things corporeal as well as incorporeal, by enacting that the former shall be deemed to lie in grant as well as in livery. Before that statute, none but incorporeal things were said to lie in grant, that is, could be made the subject of a grant; because, from their very nature, they were incapable of actual delivery of the possession: whereas corporeal tenements and hereditaments were said to lie in livery alone; because they were capable of actual delivery of possession; and it was the policy of the common law that they should only pass by such delivery, or by some other means calculated to give the public some notice or means of knowing that a transfer of ownership had taken place. (5) **DEEDS TO LEAD OR DECLARE THE USES OF FINES AND RECOVERIES**

—assurances which we shall presently notice. (6) **DEEDS OF REVOCATION OF USES.** (7) **DEEDS OF APPOINTMENT**, whereby a person, to whom a power of appointing or creating an estate is reserved or given, exercises that power. (8) **LEASES UNDER POWERS.** (9) **BARGAINS AND SALES** under the Act for the abolition of fines and recoveries. (10) **CONCISE CONVEYANCES AND LEASES** under the stat. 8 & 9 Vict. c. 119, and c. 124, and the stat. 25 & 26 Vict. c. 53. [(11) **Statutory Deeds** under the stat. 44 & 45 Vict. c. 41 (Appendix).]

There are some **DEEDS OTHER THAN CONVEYANCES**, such as **DEEDS OF COVENANT OR AGREEMENT**, AND **DECLARATIONS OF TRUST**, and **BONDS**, which are deeds whereby a person obliges himself alone, or himself or his representatives, to do some act.

Some of the conveyances, and other deeds above enumerated, receive other names, derived from the purpose to be effected by them. So that some are called purchase deeds, others mortgage deeds, others marriage settlements, others deeds of arrangement, others deeds of indemnity, others composition or creditors' deeds, etc.

There were four modes of **ALIENATION BY MATTER OF RECORD** : (1) By a **PRIVATE ACT** of Parliament. (2) By a **ROYAL GRANT** by charter or letters patent. (3) By a **FINE**, which was an amicable composition or agreement to terminate a suit (usually a fictitious suit), whereby real estate was acknowledged by one of the parties, who was called the cognisor, to be, and thereby became, the property of another of the parties, who was called the cognisee. (4) By a **COMMON RECOVERY**, which was an action (usually fictitious) not compromised, but carried through every step of proceeding, by means whereof real estate was recovered by one party, who was called the recoveror, against the tenant of the freehold, who was called the recoveree.

IV. In concluding this rapid sketch of our subject, we may briefly observe that there are *certain Persons connected with conveyancing*, of whom it is convenient to treat separately, though succinctly. Such are those who are clothed with an official character, as executors, administrators, and trustees, or with a certain civil character, as CORPORATIONS ; of which last some consist of single individuals, called corporations sole ; while others consist of a number of persons, called corporations aggregate. Such also are those who are under peculiar disabilities ; as MARRIED WOMEN ; INFANTS, that is, all persons under the age of 21 years ; ILLEGITIMATE CHILDREN ; PERSONS OF UNSOUND MIND and ALIENS.

Again, there are *certain Miscellaneous Heads of Law connected with conveyancing*, which it is also convenient to make the subject of separate consideration ; such as WASTE, or that which tends to the permanent depreciation of an inheritance ; MERGER, or the absorption of a less estate in a greater ; CONVERSION, or the actual or constructive change of property of one kind into property of a different kind ; ELECTION, or the choosing between two rights ; and SATISFACTION, or the making of a gift in extinguishment of some claim of the party to whom it is made.

# PART I.

## Of the several kinds of Things constituting the Subjects of Conveyancing.

### TITLE I.

#### OF THINGS REAL AND PERSONAL.

**THE** surface of the earth, and all things above it, upon it, or below it, whether animal, vegetable, or mineral, and whether natural or artificial, and benefits derivable from or connected with the same, may form the subject of ownership or property. And ownership or property, in its strict sense, is that exclusive right, which, at law or in equity, or both at law and in equity, the jurisprudence of a country creates in favour of some particular person or persons in regard to a given thing; although the word property is frequently used to designate, not the right to a thing, but the thing itself, when regarded with reference to such right. 1.

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TITLE I.

Subjects of  
ownership  
or property.

Definition of  
ownership  
or property.

Things which are the subject of property are either real or personal. 2.

Division of  
things.

Things real are those which are permanent and immoveable. They consist of lands and other tenements. The word land includes the surface and substance of the earth, under all circumstances, though covered with water or buildings, and everything which is permanently fixed

Things real.

Land

PART I.  
TITLE I.

## Tenements.

to the ground or incident to it, whether above it, upon it, or under it ; such as houses, woods, waters, mines, fossils. The maxim of the law is, *cujus est solum, ejus est usque ad cælum*. The word tenements, though popularly applied to buildings only, yet in its legal signification includes everything of a permanent and immoveable nature which may be holden, whether it be of a substantial and sensible, or of an unsubstantial and ideal kind (a). 3.

Peculiar  
kinds of real  
property.

A share in the New River is real property (b). And extraordinary profits incident to and dependent upon the title to and the user of land are part of it ; and hence, the profits arising from the tolls of a lighthouse are real estate, and, as such, not subject either to probate or legacy duty (c). 4.

Things  
personal.  
Chattels  
real.

Things personal are divided into chattels real and chattels personal. Chattels real are so called, because they concern the realty, and comprise such interests in things real as were in former days either of short duration or of inconsiderable value, and were therefore classed with things personal, as things of comparatively little importance : such as terms for years, which were in early times only created for purposes of agriculture, trade, or residence, and were very short ; the next presentation to a church ; and estates by statute merchant, statute staple, and elegit. Chattels personal are so called, because for the most part they are connected with or may accompany the person of the owner, and do not concern realty. They comprise such things as are moveable ; as money, garments, furniture, cattle (d). 5.

Chattels  
personal.Heredita-  
ments.

Things real are usually and conveniently designated by the comprehensive word hereditaments. Under that desig-

(a) See 2 Bl. Com. 16—19 ; 1 Cruise T. 1, § 12 ; Co. Litt. 4 a, 6 a ; 4 Cruise T. 32, c. 20, § 51 ; Burton, § 1, 2, 3.

G. & S. 394.

(c) *Att.-Gen. v. Jones*, 1 Mac. & G. 574, 590.

(b) 1 Cruise T. 1, § 3 ; *Davall v. The New River Company*, 3 De

(d) See Co. Litt. 118 b ; 2 Bl. Com. 386—7.



nation all things real are included. But it also extends to some things personal : for it includes everything that may descend to the heir ; comprising not only lands and other tenements, but also some personal property which may be inherited ; such as an heirloom or a condition, the benefit of which may descend to a man from his ancestor, or an annuity in fee, as distinguished from a rent charge (*a*). And a subject of property, whether real or personal, may be an hereditament, though held for a chattel interest or an interest of freehold not of inheritance, when that interest is carved out of an estate of inheritance. So that lands or houses held on lease for years are leasehold hereditaments ; and an annuity for years, if carved out of an annuity in fee, is also an hereditament (*b*). 6.

A person may have an inheritance in an upper chamber, although the lower buildings and soil be in another (*c*). 7.

The freehold of a chapel, or lesser chancel, though forming an integral portion of the parish church, may be vested in a private person, and may be conveyed by him to others ; and the enjoyment of it need not be annexed to a dwelling-house ; and of such ownership, immemorial repair and other proprietary acts are evidence (*d*). 8.

Sometimes that which is real estate at law, is treated as personal estate in equity. Thus real estate bought and held for the purposes of a partnership, as a part of the stock in trade, will be considered in equity, although not at law, as personal estate to all intents and purposes, whatever may be the form of the conveyance ; so as to be subject to all the equitable rights and liabilities of the partners and their creditors ; and so as to pass to the personal representatives and distributees, on the death of

(*a*) Co. Litt. 6 a ; 2 Bl. Com. 17 ; & Byth. by Sweet, 235.  
 1 Cruise T. 1, § 1 ; 4 Cruise T. 32, (c) Co. Litt. 48 b.  
 c. 20, § 52 ; 1 Pres. Shep. T. 91. (d) *Chapman v. Jones*, L. R. 4  
 (b) 1 Pres. Shep. T. 91 ; 2 Jarm. Exch. 273.

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PART I.  
TITLE I.

a partner, except, perhaps, where there is a clear and determinate expression of the deceased partner that it shall go to his heir-at-law beneficially (a). Other instances will be mentioned hereafter, in treating of conversion. And under that head it will also be seen, that, on the other hand, an interest in personal estate at law is sometimes treated as real estate in equity. 9.

(a) Story's Eq. Jur. § 674. But *Steward v. Blakeway*, L. R. 4 Ch. see 2 Spence's Eq. Jur. 208—211; Ap. 603.

## TITLE II.

### OF THINGS CORPOREAL AND INCORPOREAL.

#### CHAPTER I.

##### THINGS CORPOREAL AND INCORPOREAL DISTINGUISHED.

THINGS are further divided into things corporeal, and things incorporeal. Corporeal things are things which are the objects of sense, consisting of such things as may be seen and handled; such as houses and land. Incorporeal things are things which are objects of the mind alone, consisting of rights to certain benefits derivable from or connected with corporeal things, whether real or personal (*a*). 10.

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Things  
corporeal  
defined.

Things  
incorporeal  
defined.

To obtain a correct notion of an incorporeal thing, we must be careful not to confound together the profits produced and the hereditament or thing which produces them—the benefits arising, and the right from which they arise. An annuity, for instance, is an incorporeal thing; for although the money, which is the fruit or product of the annuity, is of a corporeal nature, yet the annuity itself, which produces that money, is a thing invisible, and has only a mental existence (*b*). So the right to shoot, kill, and take game is an incorporeal hereditament (*c*). 11.

The distinction between them illustrated.

The term incorporeal hereditaments is sometimes applied to remainders and reversions; but it would seem more accurate to treat of them rather as interests in things, than as things or subjects of property themselves (*d*). 12.

Remainders and reversions sometimes termed incorporeal hereditaments

(*a*) See 2 Bl. Com. 17, 20; 1 Cruise T. 1, § 2, 7; Burton, § 4.

(*c*) *Hooper v. Clark*, L. R. 2 Q. B. 202.

(*b*) 2 Bl. Com. 20; 3 Cruise T. 21, c. 1, § 1.

(*d*) 1 Steph. Com. 623.

PART I.  
TIT. 2, CH. 1.

Easements.

Profits à  
prendre.

Some incorporeal hereditaments which are rights of mere accommodation, are termed easements. Of these there are a great number ; such as rights of way, rights to receive air, light, and water. Others which are directly profitable, are called profits à prendre ; such as rights of common (*a*). A profit à prendre in another's soil cannot be claimed by custom, for this reason, among others, that such person's property might thus be subject to the most grievous burdens in favour of successive multitudes, as the inhabitants of a parish or other district, who could not realise the right (*b*). 13.

Things lying  
in livery.

Things lying  
in grant.

Distinction  
between a  
rectory and  
the advow-  
son of a  
rectory.

We may here notice the division of things real into things lying in livery and things lying in grant, in cases not within the stats. 7 & 8 Vict. c. 76, s. 2, and 8 & 9 Vict. c. 106, s. 2 (*c*). Things lying in livery are such things real as are capable of actual delivery, and comprise corporeal hereditaments in possession, and also certain legal aggregates, of which corporeal hereditaments form the principal part ; such as a manor consisting of land and seigniories. Things lying in grant comprise remainders and reversions, and all incorporeal hereditaments ; because these are from their very nature incapable of actual delivery, and therefore are transferred by deed of grant. But a freehold reversion expectant upon a lease for years lies in livery as well as in grant ; although, indeed, the consent of the termor is necessary to the feoffment (*d*). A rectory consisted of glebe as well as tithes, and is a corporeal hereditament, and, as such, lies in livery. But although a rectory is a corporeal hereditament, the advowson of a rectory is an incorporeal hereditament, and lies

(*a*) Burt. Comp. § 1165 ; Shelf. Real Prop. Acts, 6th ed. 2, 6.

(*b*) *Att.-Gen. v. Mathias*, 4 K. & J. 579, 591.

(*c*) See *infra*, Part III. T. 12. Ch. 3, s. 3.

(*d*) Co. Litt. 9 a, 49 a ; Burton, § 40, 42 ; Watk. Conv. 3rd ed. by Prest. 168, 171.

in grant. Tithes alone, in the sense of a right to receive a <sup>PART I</sup> <sup>TIT. 2, CH. 1.</sup> tenth, were an incorporeal hereditament; but when tithes <sup>Tithes.</sup> were parcel of a rectory, the rectory, as the principal, drew to itself the accessory (a). 14.

(a) 1 Pres. Shep. T. 94, 213, 228, n. (1); Co. Litt. 332 a, 334 b.

## CHAPTER II.

## OF CERTAIN KINDS OF INCORPOREAL HEREDITAMENTS.

## SECTION I.

*Of Annuities.*

PART I. T. 2,  
CH. 2, s. 1.

AN annuity  
defined and  
disting-  
guished  
from a  
charge.

AN annuity, in the widest sense of the term, is a right to a yearly sum not payable as interest, and chargeable both upon real and personal estate, or either upon real or personal estate of the grantor or testator who created the annuity, or upon his person only (a). But an annuity specifically so called, as distinguished from a rent charge, is a right to a yearly sum not payable as interest, and chargeable only upon the person or personal estate of the grantor or testator by whom it is created; as, if a grant is made of the sum of 20*l.* a year, without expressing out of what it shall issue, no land at all shall be charged with it, but it is a mere personal annuity (b). And a rent charge, as distinguished from an annuity, is a right to a yearly sum not payable as interest, and chargeable only on the real estate of the grantor or testator. If the person or the personal estate, as well as the real estate, is made liable, as both most commonly are, then the annual payment is frequently, if not generally, called an annuity, and is personal estate. In such a case the grantee must elect between his remedies (c). 15.

Ways of  
creating

There are several ways of giving annuities by will. Thus,

(a) See 2 Bl. Com. 40, 41; 2 Jarm. & Byth. by Sweet, 1, 2, 3, 5.

(b) 2 Bl. Com. 40; 2 Jarm. & Byth. by Sweet, 1; Co. Litt. 144 b.

(c) 2 Jarm. & Byth. by Sweet, 2, 3; Co. Litt. 219, 144 b; *Parsons v. Parsons*, L. R. 8 Eq. 260.

one way is to give an annuity generally, or out of the general personal estate. A second way is to direct a certain sum to be appropriated and set apart, and the income thereof paid to the annuitant; or a sufficient sum to be appropriated and set apart to pay an annuity of a certain amount; and to direct that after the death of the annuitant, or subject to the payment of such annuity, such sum shall form part of the testator's residuary personal estate. In neither of these ways is any money sunk in providing for the annuity; the fund which produces the annuity remains after the annuity has ceased by the death of the annuitant or otherwise. But there are two ways of giving an annuity by sinking money in the purchase thereof. The first is, to give a definite sum of money to trustees, with a direction to them to lay it out in the purchase of an annuity. The second is, to direct trustees or executors to lay out so much money as will suffice to purchase an annuity of a certain amount. In the one case, the sum given determines the amount of the annuity. In the other, the annuity specified determines the amount of the sum to be expended. 16.

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—  
annuities by  
will.

In the absence of any indication to the contrary, annuities created by will, commence from the death of the testator, and the first payment becomes due at the end of a year from that event (a). 17.

Commence-  
ment.

A personal annuity, that is, an annuity not charged on lands, but only secured by grant, bond, or covenant, or bequeathed by will, may be limited to a person and his heirs in fee simple, or as a fee conditional, or to a person and his heirs pur autre vie (b), or to a person for his own life or for a term of years. Such an annuity in fee is a personal inheritance, which passes under a general bequest of the personal estate of the annuitant (c). 18.

For what  
interests a  
personal  
annuity  
may be  
limited.

(a) 2 Rep. Leg. by White, 1245;  
11 Jarm. & Byth. by Sweet, 470.

(b) 2 Jarm. & Byth. by Sweet, 13.  
(c) 2 Jarm. & Byth. by Sweet, 5, 13.

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CH. 2, s. 1.

Duration of  
annuity,  
where it is  
given  
indefinitely.

Distinctions  
connected  
with this  
point.

In the ordinary acceptation of the term, an annuity imports an annual sum for the life of the donee only (*a*); and hence, if an annuity is given indefinitely, it is an annuity for his life only (*b*). But in connection with this rule, there are some important distinctions:—

1st. We must be careful to distinguish from the gift of an annuity, the gift of the income of a fund. The gift of the income of a fund, whether particular or residuary, whether consisting of money, or of stock, or of any other personalty, without limit as to time, and without any disposition of the corpus, is a gift of the fund itself, although without words of limitation to the executors or administrators, and without the words “for ever,” or any equivalent expressions; because there would be nobody who could ever claim the capital, if it were not held to belong to the person to whom the income of the fund is so given (*c*). 19.

2ndly. There are cases in which, although an annuity is given without words of limitation, yet it is not given indefinitely, but there are expressions in the will which serve to show the testator’s intention that the annuity should have a perpetual existence (*d*). 20.

3rdly. If a testator dedicates the corpus of his property, or a portion of the corpus of his property, to the purpose of purchasing or providing an annuity of a certain amount, without indicating that such annuity is to be of less

(*a*) See remarks of Lord Cottenham, *C.*, *Blewitt v. Roberts*, Cr. & Ph. 280; *Blight v. Hartnoll*, L. R. 19 Ch. D. 294; 23 Ch. D. (Ap.) 218.

(*b*) *Yates v. Maddan*, 3 Mac. & G. 543, and cases there cited; *Kerr v. The Middlesex Hospital*, 2 D. M. & G. 583; *Lett v. Randall*, 3 Sm. & G. 83; 2 D. F. & J. 388; *V.-C. Wood*, in *Hill v. Rattey*, 2 Johns. & Hem. 639.

(*c*) *Philips v. Chamberlaine*, 4 Ves. 50, 58; *Stretch v. Watkins*, 1 Mad. 253; *Clough v. Wynne*, 2 Mad. 188, 190; *Rawlings v. Jennings*, 13 Ves. 39; *Bignold v. Giles*, 4 Drewry, 343.

(*d*) *Robinson v. Hunt*, 4 Beav. 450; *Pawson v. Pawson*, 19 Beav. 146; *Timins v. Stackhouse*, 27 Beav. 484.



duration, the annuitant will be entitled to a perpetual annuity (a). 21.

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4thly. Where a testator, after giving an annuity to a person for life, proceeds to limit it over to another person indefinitely, and, in the words in which it is limited over or some other words in the will, the annuity is spoken of as if, without reference to the benefit of such other person, it would have an existence beyond the life of the prior taker; there the second taker has a perpetual annuity (b). 22.

5thly. Where a testator, after giving an annual sum to certain persons for their lives, proceeds to limit it over, after their decease to their children, and directs that in case any of such persons, the prior takers, should die without issue, then the annuity shall cease, and sink into the residue of the estate, and there is no provision that the several shares of the annuities which the children were to take, if there *were* children, shall fall into the residue on their death, whether with or without issue, there the children take perpetual annuities (c). 23.

When an annuity is directed by will to be purchased, without reference to any contingency, the annuitant takes an immediate vested interest in the price or value of it; so that he may elect to take the price or value, instead of the annual payment; and so that his personal representatives will be entitled to it, though he happens to die immediately after the testator, and though the annuity is not to be purchased until some time subsequent to the

Right to the  
price or  
value of an  
annuity  
instead of  
the annual  
payment.

(a) *Kerr v. The Middlesex Hospital*, 2 D. M. & G. 576, 583, 584, 587; *Stokes v. Heron*, 2 Dru. & W. 89; 12 Cl. & Fin. 161; with which compare *Wilson v. Maddison*, 2 Y. & C. C. C. 370; *Re Grove's Trusts*, 1 Gif. 74; *Hill v. Rattey*, 2 Johns. & Hem. 634; *Hicks v. Ross*, L. R. 14 Eq. 141.

(b) See remarks of Lord *Cottenham*, in *Stokes v. Heron*, 12 Cl. &

Fin. 161, and of Lord *Truro* in *Yates v. Maddan*, 2 M. & G. 540; *Mansergh v. Campbell*, 25 Beav. 544; 3 D. & J. 232; *Bent v. Cullen*, L. R. 6 Ch. Ap. 235; *Wilkins v. Jodrell*, L. R. 13 Ch. D. 564.

(c) *Hedges v. Harpur*, 3 D. & J. 129, reversing the decision of Lord *Langdale*, 9 Beav. 479; *Fielding v. Preston*, 5 W. R. 851.

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testator's death, and though the money with which it was to be purchased is to be raised by a sale of real estate after the death of a tenant for life who survived the annuitant (a). **24.**

The principle upon which the Court has acted in thus frustrating what was doubtless in most of these cases the design of the testator, is this: that the testator has dedicated a certain sum for the benefit of the annuitant; that he takes a vested interest therein at the moment of the testator's death; and that it would be useless to enforce the purchase of an annuity when the annuitant could sell it immediately after it was purchased. **25.**

It should be held that no such right to the price or value can exist, where either it is expressly excluded, or there is a gift over in a particular event. See *Power v. Hayne*, L. R. 8 Eq. 262, and *Hatton v. May*, L. R. 3 Ch. D. 148, in which V.-C. Malins declined to follow V.-C. Kindersley's decision in *Day v. Day*, 1 Drew. 569. But in *Hunt-Foulston v. Furber*, L. R. 3 Ch. D. 285, V.-C. Hall held that the exclusion of the right to the price or value was not effected by express words of exclusion or by a gift over, where the trustees are directed to buy an annuity in the name of the annuitant, and the trust ends there, though a proviso excluding the right to the price or value is added, with a direction that on a sale the annuity should cease and form part of the residue. It is lamentable that judges should think it their duty thus needlessly to frustrate the plainly expressed and wise intention of a testator. **26.**

It may be proper to suggest that when a testator is

(a) 1 Rep. Leg. by White, 640; 11 Jarm. & Byth. by Sweet, 468; 1 Jarm. Wills, 2nd ed. 326; *Yates v. Compton*, 2 P. W. 308; *Barnes v. Rowley*, 3 Ves. 305; *Bayley v. Bishop*, 9 Ves. 6; *Palmer v. Crawford*, 3 Swans. 482; *Danson v. Hearn*, 1 Russ. & M. 606; *Woodmeston v. Walker*, 2 Russ. & M. 197; *Ford v. Battley*, 17 Beav. 308; *Re Browne's Will*, 27 Beav. 324.

desirous that a sum of money should be laid out in the purchase of an annuity at a future time, he should be asked what would be his wish in the event of the intended annuitant dying before that time—whether he would wish the principal to form part of the intended annuitant's personal estate, or whether he would wish it to sink into the residue, or to lapse for the benefit of the heir, in case it is to be raised out of the proceeds of real estate, or to go over to any other person. A testator desirous that an annuity should be purchased, should also be asked whether he wishes the intended annuitant to have the option of taking the price or value of the annuity, instead of the annuity itself. And if the testator does not intend, as in almost every case he would not intend to give any such option, there should be a clause in restraint of alienation or anticipation, so worded as to make the annuity expressly determinable on alienation or anticipation. A clause merely excluding the option of taking the price or value would be inoperative (a). 27.

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Whether an  
annuity is  
charge on  
the corpus  
a fund.

Where a testator, in giving an annuity, manifests an intention that the fund which is to produce the annuity shall continue in its integrity during the life of the annuitant, and in that state shall go over to another person or persons, otherwise than as residuary legatee or legatees, after the death of the annuitant, there, in case the fund is not sufficient to produce the annuity, the annuitant is not entitled to have the deficiency made up out of the corpus of the fund (b). 28.

But where a testator manifests an intention that the annuitant shall take the full amount of the annuity at all

(a) *Stokes v. Cheek*, 28 Beav. 598.

(b) *Baker v. Baker*, 6 Ho. of Lords, 616, reversing decision of the Courts below, 20 Beav. 548; 7 D. M. & G. 681; *Hindle v. Taylor*, 20

Beav. 109; *Addcott v. Addcott*, 29 Beav. 460; *Sheppard v. Sheppard*, 32 Beav. 194; *Taylor v. Taylor*, L. R. 17 Eq. 324; *Michell v. Wilton*, L. R. 20 Eq. 269.

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events, there, if the fund which is to produce the annuity proves insufficient to answer it, the annuity will be a charge upon, and the deficiency will be raised out of, the corpus of the fund, unless the testator provides for the deficiency in some other way (a). 29.

And where the terms employed do not of themselves negative an intention that the annuity shall, in case of default of income, be paid out of the corpus, and after the death of the annuitant the annuity fund is to fall into the residue or to go to another person as residuary legatee, there also, if the fund proves insufficient to answer the annuity, the deficiency will be payable out of the corpus (b). 30.

It would seem, then, that to determine whether an annuity is payable, in case of deficiency of income, out of the corpus of a fund, these questions must be asked: 1st. Are there any words which not merely express an intention that the annuity is to be paid out of the income, but also negative an intention that it should be paid out of the corpus? 2ndly. If there are no such words, is there any indication that the annuity fund shall in every event continue entire during the life of the annuitant? or, on the other hand, is there any indication that the annuitant shall take the full amount of the annuity at all events? If the answer to these questions be not clear, then we must inquire, 3rdly, Is any disposition of the fund made after the death of the annuitant? If it is directed to fall into the residue, or it is given to residuary legatees, as residuary legatees, then the annuity is payable out of the

(a) See remarks of Lord *Chelmsford*, C., and Lord *Oranworth*, in *Baker v. Baker*, 6 Ho. of Lords, 616; *Bright v. Laroker*, 3 D. & J. 148; *Birch v. Sherratt*, L. R. 4 Eq. 58; 2 Ch. Ap. 644; *Phillips v. Gutteridge*, 3 D. J. & Sm. 332;

*Pearson v. Hollinwell*, L. R. 18 Eq. 411.

(b) *Wright v. Callender*, 2 D. M. & G. 652; *Perkins v. Cooke*, 2 Johns. & H. 393; *Upton v. Vanner*, 1 Dr. & Sm. 594.

corpus, in case of default of income (a). And the reason is this : a testator usually, if not invariably, contemplates a sufficiency of assets for all the purposes of his will, unless he expressly provides for the case of a deficiency; and he intends a pecuniary benefit of a certain amount for his annuitants. Whereas, for his residuary legatees he only designs that measure of benefit which they may happen to receive after the full accomplishment of all the specific purposes of his will. But if, on the other hand, the testator directs that after the death of the annuitant, the annuity shall go over to other persons, otherwise than as residuary legatees, there the annuity is not payable out of the corpus in case of default of income (b). And the reason is this : the persons to whom the annuity fund is limited after the death of the annuitant are as much special objects of the testator's bounty, to a definite amount, as the annuitant himself. The question in such case is not between a person who is to receive an annuity of a certain amount, and a person who is to receive a residue of an uncertain amount ; but it is a question between a tenant for life and a remainder man. 31.

The use or the absence of the word "annuity" does not affect the question (c). 32.

It will be evident from what has been said that it is highly expedient to declare whether or not it is the intention that in case of deficiency of income, the annuity should be payable out of the capital ; and that where this

(a) *Wright v. Callender*, 2 D. M. & G. 652 ; *May v. Bennett*, 1 Russ. 370 ; *Wroughton v. Colquhoun*, 1 De Gex. & Sm. 36 ; *Mills v. Drewitt*, 20 Beav. 632, and the remarks of Lord *Chelmsford*, C., in *Baker v. Baker*, 6 Ho. of Lords, 623 ; Vice-Chancellor *Wigram*, in *Att.-Gen. v. Poulden*, 3 Hare, 561 ; *Stelfox v.*

*Sugden*, 1 Johns. 234 ; *Carmichael v. Gee*, L. R. 5 Ap.Cas. 588 ; *Wormald v. Museen*, L. R. 17 Ch.D. 167.

(b) *Baker v. Baker*, 6 Ho. of Lords, 606 ; *Att.-Gen. v. Poulden*, 3 Hare, 555 ; *Earle v. Bellingham*, 24 Beav. 445.

(c) *Mills v. Drewitt*, 20 Beav. 632.

PART I. T. 2, is not expressed, there must often be the greatest danger of  
CH. 2, s. 1. forming a wrong opinion upon the question. 33.

Where annuities are a continuing charge on rents.

It is sometimes a question whether annuities are charges only on the rents accruing *de anno in annum*, or on rents accruing after the death of the annuitant, where the rents in his lifetime were insufficient (*a*). The draftsman should take care to exclude such questions. 34.

Cesser of annuity.

If an annuity is charged upon a fund which fails during the life of the annuitant, the annuity will also fail, although expressly given for life (*b*). And whenever an annuity is granted for the performance of any duty or service, and the grantee refuses or neglects to perform it, the annuity becomes extinct (*c*). And so if an annuity is granted for a piece of land, and the land is evicted by an elder title, the annuity ceases (*d*). 35.

Abatement.

Where a testator's effects are insufficient to satisfy an annuity and the pecuniary legacies bequeathed by his will, the annuity is to be valued, and the annuitant is entitled at once to the amount of the valuation, subject to an abatement in proportion to the abatement of the pecuniary legacies; and, if the annuitant has died, his representatives are nevertheless entitled to the whole of such abated amount (*e*). 36.

When the corpus of an estate charged by will with annuities is insufficient to pay the arrears, it will be divided between the annuitants in proportion to the value of their respective annuities. If all the annuitants be living at the period of the division, the value must be ascertained as at the death of the testator. If they be all dead, the values must be taken to be the respective amounts of arrears; but if some be dead and others living, the value, as to the

(*a*) See *Booth v. Coulton*, L. R. 5 Ch. Ap. 684; *Taylor v. Taylor*, L. R. 17 Eq. 324.

(*b*) 2 Rep. Leg. by White, 1482.

(*c*) 2 Jarm. & Byth. by Sweet, 91; Co. Litt. 204 a.

(*d*) Co. Litt. 204 a.

(*e*) *Wroughton v. Colquhoun*, 1 De G. & S. 357.

former, will be taken at the amount of their arrears, and as to the latter at the amount of their arrears added to the calculated value of the future payments (a). 37.

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The rules of construction of legacies generally apply to gifts of annuities (b). 38.

Construction  
of  
annuities.

By certain statutes (with some exceptions) memorials of the particulars of instruments creating life annuities or rent charges were required to be enrolled in Chancery. These enactments were repealed. But it has since been provided, by the statute 18 Vict. c. 15, that life annuities and rent charges, otherwise than by marriage settlement or by will, shall not affect any hereditaments, as to purchasers, mortgagees, or creditors, unless and until registered. Thus—

Enrolment  
or registra-  
tion.

By the statute 53 Geo. 3, c. 141, s. 2, it was enacted, “That, within thirty days after the execution of every deed, bond, instrument, or other assurance, whereby any annuity or rent charge shall, from and after the passing of this Act, be granted for one or more life or lives, or for any term of years or greater estate determinable on one or more life or lives, a memorial of the date of every such deed, bond, instrument, or other assurance, of the names of all the parties and of all the witnesses thereto, and of the person or persons for whose life or lives such annuity or rent charge shall be granted, and of the person or persons by whom the same is to be beneficially received, the pecuniary consideration or considerations for granting the same, and the annual sum or sums to be paid, shall be enrolled in the High Court of Chancery.” This Act was amended and explained by the statute 3 Geo. 4, c. 92, as to the description of the witnesses in the memorial, and as to non-enrolment of collateral deeds; and by the statute 7 Geo. 4, c. 75, as to the names of the witnesses in the

Enrolment  
under stat.  
53 Geo. 3,  
c. 141, etc.

(a) *Todd v. Bialby*, 27 Beav. 353; (b) 2 Rep. Leg. by White, 1484.  
*Potts v. Smith*, L. R. 8 Eq. 683.

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CH. 2, s. 1.

Exceptions.

memorial. By sect. 10 of the statute 53 Geo. 3, c. 141, it was enacted, "That this Act shall not extend to Scotland or Ireland, nor to any annuity or rent charge given by will or by marriage settlement or for the advancement of a child, nor to any annuity or rent charge secured upon freehold or copyhold or customary lands in Great Britain or Ireland or in any of his Majesty's possessions beyond the seas, of equal or greater annual value than the said annuity (over and above any other annuity and the interest of any principal sum charged or secured thereon of which the grantee had notice at the time of the grant) whereof the grantor is seised in fee simple or fee tail in possession, or the fee simple whereof in possession the grantor is enabled to charge at the time of the grant, or secured by the actual transfer of stock in any of the public funds, the dividends whereof are of equal or greater annual value than the said annuity; nor to any voluntary annuity or rent charge granted without regard to pecuniary consideration or money's worth; nor to any annuity or rent charge granted by any body corporate, or under any authority or trust created by Act of Parliament." 39.

Repeal of  
statutes.

Registration  
under stat.  
18 Vict.  
c. 15.

By the statute 17 & 18 Vict. c. 90, the above statutes were repealed as to future transactions. But by the statute 18 Vict. c. 15, s. 12, it is enacted that, "any annuity or rent charge granted after the passing of this Act, otherwise than by marriage settlement, for one or more life or lives, or for any term of years or greater estate determinable on one or more life or lives, shall not affect any lands, tenements, or hereditaments as to purchasers, mortgagees, or creditors, unless and until a memorandum or minute containing the name, and the usual or last known place of abode, and the title, trade, or profession of the person whose estate is intended to be affected thereby, and the date of the deed, bond, instrument, or assurance whereby the annuity or rent charge is granted; and the annual sum or



sums to be paid, shall be left with the senior master of the Court of Common Pleas at Westminster, who shall forthwith enter the particulars aforesaid in a book in alphabetical order by the name of the person whose estate is intended to be affected by the annuity or rent charge, together with the year and the day of the month when every such memorandum or minute is so left with him." By s. 14, however, "the provisions of this Act shall not extend to require the registry of annuities or rent charges given by will" (a). 40.

It has been held, however, by the Lords Justices, on appeal, in the case of *Greaves v. Tofield*, L. R. 14 Ch. D. 563, that an unregistered annuity is valid as against all subsequent incumbrancers who took with notice of the annuities, and against the trustee in bankruptcy of the grantor. 40a.

## SECTION II.

### *Of Rents (b).*

A rent is a right to a certain thing, whether money, or a chattel, or service, to be rendered periodically, as a compensation or acknowledgment for the possession of real estate, or as a charge thereon (c). There are at common law three kinds of rents: rent service, rent charge, and rent seek (d). 41.

Rent service is a rent by which a tenant holds, and which has some corporeal service, as fealty at the least, incident to it; and for this the lord might distrain of common right, without reserving any special power of distress, provided he had in himself the reversion or future estate of the lands or tenements, subject to or

PART I. T. 2  
CH. 2, s. 2.  
Definition of  
a rent.

Rent  
service.

(a) As to the discharge of annuities and rent charges, see end of Ch. 3, in Part II. Tit. 10.

(b) See Part III. Tit. 12, Ch. 1, s. 9, on Reservations.

(c) See Co. Litt. 142 a, 144 a; 2 Bl. Com. 41; Woodfall's Land. and Ten. 7th ed. 309; and infra, Part III. T. 12, Ch. 1, s. 9.

(d) Litt. s. 213.

**PART I. T. 2.**  
**(Ch. 2, s. 2.)** expectant upon the lease or particular estate of the lessee or grantee (*b.*) **42.**

**Rent charge.**

A rent charge is a rent granted by or reserved to a person seised of land, to be payable out of or chargeable on such land, and secured by a clause of distress, and generally, except in the case of copyholds, by a power of entry, either at common law, by means of a special condition that the grantee may enter and take the profits until payment or satisfaction, or else by way of use; as where a conveyance is made to C. and his heirs, to the use that B. may receive an annual sum; and to the further use that if unpaid, he may enter and take the profits until he is satisfied. If the grantee assigns this annual sum, the right of entry by way of use passes with it to the assignee (*b.*). These powers of entry cannot be given in the case of copyholds, because they are not within the Statute of Uses, and because the tenant cannot convey a copyhold estate except by surrender (*c.*) **43.**

**Rent seek.**

A rent seek, or barren rent (*reditus siccus*), is nothing more than a rent for the recovery of which no power of distress is given, either by the rules of the common law, or the agreement of the parties (*d.*) **44.**

**Extension of remedy by distress.**

The remedy by distress is, however, extended by the statute 4 Geo. 2, c. 28, s. 5, to the proprietors of what were formerly called rents seek: and by the statute 3 & 4 Will. 4, c. 42, s. 37, 38, it is given to the executors or administrators of the proprietors of such rents, even after the termination of the leases upon which such rents are reserved. **45.**

Although every species of rent is comprised in the pre-

(a) 3 Cruise T. 28, c. 1, § 4; Co. Litt. 87 b. 141 b. 142 a; Wath. Conv. 3rd ed. by Prest. 152.

(b) 2 B. Com. 42; 2 Jarm. & Byth. by Sweet, 2, 46—8; Litt. s. 217, 218; Co. Litt. 203 a. n. 3;

Wath. Conv. 3rd ed. by Prest. 154.

(c) 2 Jarm. & Byth. by Sweet, 49.

(d) 3 Cruise T. 28, c. 1, § 11; Wath. Conv. 3rd ed. by Prest. 154; Litt. s. 217, 218.

ceeing division, yet there are some rents which are known by particular names. Thus, the certain established rents of the freeholders and ancient copyholders of manors are called rents of assize. Those of the freeholders are frequently called chief rents (*reditus capitales*), and both sorts are indifferently denominated quit rents (*quieti reditus*), because thereby the tenant goes quit and free of all other services (*a*). Rack rent is only a rent of the full value of the tenement, or near it (*b*). And a fee farm rent is a perpetual rent reserved on a conveyance of land in fee simple (*c*). 46.

PART I. T. 2.  
CH. 2, s. 2.

Rents of  
assize.

Chief rents.

Quit rents.

Rack rent.

Fee farm  
rent.

Land tax  
converted  
into a fee  
farm rent.

By the statute 42 Geo. 3, c. 116, s. 154, where the land tax has not been redeemed in due time by the owner of the land, it may be purchased by any other person, in whose hands it is converted into a fee farm rent, with all the remedies of rent reserved upon a lease (*d*). 47.

Since the statute of Quia Emptores, no rent service can have been reserved by a subject on a total alienation of his estate; nor could it ever be so reserved as to be payable to any other person than the actual grantor of the estate in the land (*e*). But rents charge and rents seck, as they may be created by grant from the owner of the land while he retains his property in it, so may they also be reserved on a total alienation (*f*). 48.

Reservation  
of a rent  
service, rent  
charge, or  
rent seck.

Rent charges were considered as contrary to the policy of the common law; for, by reason of the rent charge the person who was to pay it was less able to perform the military services to which he was bound by his tenure, and the grantee of the rent charge was under no feudal obligations of service; and therefore a rent charge was said to be against common right (*g*). 49.

Rent  
charges  
are against  
common  
right.

(a) 2 Bl. Com. 28; 3 Cruise T. 28, c. 1, § 12.

(b) 2 Bl. Com. 43.

(c) 3 Cruise T. 28, c. 1, § 13; Co. Litt. 143 b, n. 5.

(d) Burton § 1131.

(e) Burton, § 1102; Litt. s. 215, 216, 345—6; Co. Litt. 143 b.

(f) Burton, § 1103.

(g) 3 Cruise T. 28, c. 1, § 7; Co. Litt. 164 b, 298 n. 2.

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CH. 2, s. 2.

Creation  
of rent  
charge.

Conveyance  
to use.

A rent  
cannot be  
newly  
created by  
bargain  
and sale.

No particu-  
lar words  
necessary  
in creating  
a rent  
charge or  
rent seck.

A rent charge may be created either by grant at common law or by means of the Statute of Uses (*a*). And it may be also conveyed to uses, which will be executed by the statute, so that the grantee immediately acquires actual seisin or possession of the rent by virtue of the statute (*b*). The operation of the Statute of Uses is the same in the case of rents as in that of lands (*c*). Thus, where it operates, it transfers the legal estate, and it only transfers the legal estate in the rent to the first cestui que use: so that a use of a rent upon a use is only a trust (*d*). And it does not operate (except in case of necessity), unless the cestui qui use is a different person from the party seised by the use (*e*). But a rent cannot be newly created by bargain and sale, because there is no rent in esse in the bargainor to be executed in the cestui que use (*f*). 50.

No peculiar form of words is necessary for the creation of rents seck or rents charge. Thus, if one man grants to another, that, if he be not paid 20s. every Christmas, he may distrain for it in certain lands of the grantor; this annual sum, unless it be more formally charged on other lands, is a rent charge issuing out of those specified (*g*). So, if land is devised by will, "subject to," or "charged with," or "upon condition to pay" a rent or annuity, this (without any clause of distress) is sufficient to create a rent seck, which will come within the provisions of the stat. 4 Geo. 2, c. 28, s. 5 (*h*). 51.

(*a*) 3 Cruise T. 28, c. 1, § 8; Co. Litt. 271 b, n. 1, VII. 3; *Gilbertson v. Richards*, 4 Hurl. & Norm. 277; and 5 Hurl. & Norm. 453.

(*b*) *Heelis*, app., *Blain*, resp., 18 C. B. (N. S.) 90.

(*c*) As to which, see *infra*, Part II. Tit. 8, Ch. 1.

(*d*) Co. Litt. 271 b, n. 1, VII. 3; 315 a, n. 1; 298 a, n. 2; 3 Cruise T.

28, c. 2, § 24. 26; 2 Jarm. & Byth. by Sweet, 8.

(*e*) *Orme's Case*, L. R. 8 C. P. 281; *Hadfield's Case*, L. R. 8 C. P. 306.

(*f*) See 2 Jarm. & Byth. by Sweet, 8.

(*g*) Co. Litt. 147 a; Burton, § 1105.

(*h*) Burton, § 1110; see *supra*, par. 45.

A rent cannot be reserved out of a rent (*a*). Indeed a rent must in general issue out of lands or tenements of a corporeal nature, whereto the grantee may have recourse to distrain (*b*). But by the statute 5 Geo. 3, c. 17, certain ecclesiastical persons may reserve a rent out of tithes or other incorporeal hereditaments. A rent may also be reserved by the Crown out of an incorporeal hereditament, by prerogative (*c*). And a rent may be reserved upon a grant of an estate in remainder or reversion; for, though the grantee cannot distrain during the continuance of the particular estate, yet there will be a remedy by distress whenever the remainder or reversion comes into possession (*d*). 52.

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Ch. 2, s. 2.

Out of what  
a rent may  
be reserved.

A person entitled to a rent service cannot acquire a seisin in deed before the rent becomes due; for nothing but the actual receipt of it will have that effect. And the only mode of acquiring a seisin in deed of a rent charge, when created by a grant at common law, is by the actual receipt of the whole or some part of it. But where a rent is created by means of a conveyance to uses, the grantee immediately acquires a seisin by the words of the statute (*e*). 53.

Seisin of a  
rent.

A rent service, that is, the incorporeal hereditament itself, is real property, and descends or devolves to the person entitled to the reversion of the lands out of which the rent issues. But an amount of rent service actually due is personal property of the person entitled to the rent service at the time it became due. If, therefore, a lessor seised in fee who is entitled to a rent service outlives the day on which an amount becomes due, it will go to his

A rent is  
real pro-  
perty.

(*a*) 3 Cruise T. 28, c. 1, § 17; 1 Pres. Shep. T. 81.

(*b*) Co. Litt. 47 a, 142 a, 144 a; 3 Cruise T. 28, c. 1, § 16; 2 Jarm. & Byth. by Sweet, 3, 4; 1 Pres. Shep. T. 81.

(*c*) 1 Pres. Shep. T. 81; 3 Cruise T. 28, c. 1, § 18, 23; Co. Litt. 47 a.

(*d*) 3 Cruise T. 28, c. 1, § 20; Co. Litt. 47 a, 142 a.

(*e*) 3 Cruise T. 28, c. 1, § 15.

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CH. 2, s. 2.

executor or administrator ; but if he dies before that day it will go to his heir as incident to the reversion, and form part of the personalty of the heir, when due (a). A rent charge of inheritance is also real property, descendible to the heir. But an amount of rent charge actually due is personal property of the person entitled to the rent charge at the time it became due (b). 54.

Estate in  
a rent.

A rent charge may be limited in fee, or in tail, or for life of the grantor or grantee or any other person, or for any number of lives or years (c). A person may be tenant by the curtesy of a rent service, where he is entitled to the reversion, as also of a rent charge (d); and a rent service or a rent charge in fee or in tail is also subject to dower (e). 55.

A rent charge being against common right (f), the grantee in tail of a rent charge de novo, if there was no limitation over of it in fee, acquired by a common recovery a base fee only, determinable upon his decease and failure of issue in tail. And a widow of a tenant in tail of a rent charge who has died without issue, has no dower. And if a tenant in fee of a rent charge dies without heirs and without having devised the rent, the rent does not escheat, but sinks into the land (g). 56.

Duration  
of rent  
charge.

The 28th section of the Wills Act, 1 Vict. c. 26, which supplies the want of words of limitation, is only applicable to a devise of real estate actually existing at the time of the testator's death. So that it applies to a rent charge in fee simple or a fee farm rent vested in him at that time, but not to a rent charge which he creates de novo by his will (h). And hence in creating a rent charge in fee de novo even by will, notwithstanding the 28th section of the

(a) See 3 Cruise T. 28, c. 1, § 55.

(f) See *supra*, par. 49.

(b) See 3 Cruise T. 28, c. 1, § 62.

(g) Co. Litt. 298 a, n. 2; 2 Jarm & Byth. by Sweet, 62.

(c) 3 Cruise T. 28, c. 2, § 2, 3.

(d) 3 Cruise T. 28, c. 2, § 10.

(h) *Nichols v. Hawkes*, 10 Hare.

(e) 3 Cruise T. 28, c. 2, § 13, 14.

342.

Wills Act, it is still necessary to use the words of limitation "and his heirs," or words equivalent thereto. But if it is desired to grant an annuity or rent charge of inheritance de novo, it is not sufficient to use words of limitation. For it seems from the books, that if a man grants an annuity or rent charge de novo without saying "for himself or his heirs," it will determine by the death of the grantor, even though made to the grantee and his heirs (a). 57.

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CH. 2, s. 2.

A rent charge may be granted de novo, so as to commence at a future time, within the rule against perpetuities (b). But a rent in esse or already created, cannot be granted to commence in futuro; because to such a rent there may be a precedent title, and the person having such title would not be able to discern against whom to proceed for recovering it (c). 58.

Rent to  
commence  
in futuro.

On a grant of the reversion or of a part of the land in reversion, the rent, or a proportionable part thereof, passes immediately with the reversion, as an incident, without any express mention of it in the grant (d). 59.

Rent passes  
with rever-  
sion.

A rent may be limited de novo, so as to cease for a time only, and afterwards to revive (e). 60.

Rent limited  
to cease for  
a time.

If two tenants in common or two persons severally seised of land join in the grant of a rent of a certain amount, the grantee shall have two rents of that amount (f), by reason of the severalty of the seisin or ownership, and the want of words apportioning the liability of rent between or among the grantors, and also by reason of the rule that a grant shall be construed most strongly against the grantor and in

Grant of  
rent by  
tenants in  
common, or  
by persons  
severally  
seised.

(a) See Co. Litt. 144 b; 2 Jarm. & Byth. by Sweet, 6; 2 Vin. Ab. 505.

Fearne, 529; Watk. Conv. 3rd ed. by Prest. 158.

(b) See infra, Part II. T. 9, Ch. 1, s. 5; *Gilbertson v. Richards*, 4 Hurl. & Norm. 277; 5 Hurl. & Norm. 453.

(d) 3 Cruise T. 28, c. 3, § 29.

(e) 3 Cruise T. 28, c. 2, § 23.

(f) Co. Litt. 197 a; 1 Pres. Shep. T. 98; Watk. Conv. 3rd ed. by Prest. 88, 159.

(c) 3 Cruise T. 28, c. 2, § 21, 22;

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CH. 2, s. 2.

Reservation  
of a rent to  
tenants in  
common.

Grant of  
annuity by  
two.

Legacy  
duty.

favour of the grantee (a). Hence it is observed by Preston, that "when tenants in common mean to join in creating one entire rent, payable out of the property, they must, to avoid the construction of law which would treat each of them as granting a distinct rent out of his part, make a conveyance to uses, and raise the rent by declaration of uses" (b). But if two tenants in common create an estate, *reserving* a rent to them and their heirs, they shall have but one rent, according to their express reservation (c). And if two persons grant a personal annuity, the grantee shall have but one annuity (d). 61.

An annuity bequeathed by will, though payable out of lands and secured by powers of distress and entry, is liable to legacy duty (e), which must be paid by the annuitant, unless the testator manifests an intention that it should be paid out of his residuary estate (f). Where a testator devises real estate, subject to the payment of a "clear yearly rent charge or annuity," or "one annuity or clear yearly sum," the annuitant takes that amount clear of the legacy duty (g). And where lands are to the use (*inter alia*) that a person shall take, from and out of the same premises, a certain annuity or yearly rent charge, to be paid clear of all taxes and deductions, the annuity is to be paid clear of legacy duty, and is a charge upon the land (h). And so in other cases, where an annuity is given in terms which import that it is to be clear, or without deduction or abatement, or free from all expense (i). 62.

(a) Co. Litt. 197 a; 1 Pres. Shep. T. 98; Watk. Conv. 3rd ed. by Prest. 88, 159.

(b) Watk. Conv. 3rd ed. 159.

(c) Co. Litt. 197 a; 1 Pres. Shep. T. 98.

(d) Co. Litt. 144 b.

(e) 11 Jarm. & Byth. by Sweet, 491.

(f) *Gude v. Mumford*, 2 Y. & C.

(Ex.) 455.

(g) *Baily v. Boulton*, 14 Beav. 595; *Gude v. Mumford*, 2 Y. & C. (Ex.) 448.

(h) *Stow v. Davenport*, 5 B. & Ad. 359; 2 Nev. & M. 805.

(i) 1 Jarm. Wills, 2nd ed. 155, n. (a); 2 Williams on Exors. 1487-1494.



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CH. 2, S. 2.

But where a testator directs the investment of a sufficient amount to produce a certain "clear yearly sum," which he gives to different persons in succession, who may stand in different degrees of relationship to him, the word "clear" refers to the expenses of the investment, and not to the legacy duty; for as the legacy duty payable in respect of the different degrees of relationship may be different, it would be impossible to ascertain what precise sum ought in the first instance to be invested, so as to cover the legacy duty in every case (a). **63.**

A rent service being something given by way of return to the lessor for the use of the land demised, if the tenant is by any means deprived of the land demised, his obligation to pay the rent ceases (b). Resumption or purchase of the tenancy by the lord also causes an extinguishment of the rent (c). Where a person who has a rent service purchases part of the land out of which the rent issues, only a part of the rent service proportioned to the land purchased is discharged. And a person who has a rent service may release a part of it, which will only determine the part released (d). So where part of the land in reversion is granted away, the rent service will be apportioned (e). **64.**

Cesser of a  
rent service.Apportion-  
ment of a  
rent service  
itself, as dis-  
tinguished  
from an  
apportion-  
ment of the  
product  
thereof.

A rent service may also be apportioned by a devise of it to several persons (f). And where only part of the land is evicted, the rent will be apportioned (g). **65.**

Rent charges being against common right (h), the law gives effect to them only so far as, but for any act of the law itself, they can take effect in the manner originally intended by the grantor. And hence if the person entitled

Cesser of a  
rent charge,  
or appor-  
tionment  
of a rent  
charge itself  
as distin-  
guished

(a) *Sanders v. Kiddell*, 7 Sim. 536; *Pridie v. Field*, 19 Beav. 497.

(b) 3 Cruise T. 28, c. 3, § 1.

(c) 3 Cruise T. 28, c. 3, § 3.

(d) 3 Cruise T. 28, c. 3, § 5, 6; 2

Jarm. & Byth. by Sweet, 60, 61.

(e) 3 Cruise T. 28, c. 3, § 29.

(f) 3 Cruise T. 28, c. 3, § 30.

(g) 3 Cruise T. 28, c. 3, § 31.

(h) See *supra*, par. 49.

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from an  
apportion-  
ment of the  
product  
thereof.

to a rent charge purchases any part of the land out of which it issues, the whole rent is extinct, upon the metaphysical ground that the rent is entire, and issuing out of every part of the land (*a*), and yet it cannot issue out of the part purchased, because a man cannot pay rent to himself. And so if a devise of part of the land out of which a rent charge issues is made to the grantee of such rent charge, it is extinguished (*b*). But if part of the land descends to the person entitled to the rent charge, or if the rent charge descends to a person who has part of the land, an apportionment takes place; for *actus legis nemini facit injuriam* (*c*). By the old law, if a person having a rent charge released all his right in a part of the estate, the rent became extinct. But he might release part of the rent charge without affecting the rest (*d*). And now, by stat. 22 & 23 Vict. c. 35, s. 10, "the release from a rent charge of part of the hereditaments charged therewith shall not extinguish the whole rent charge, but shall operate only to bar the right to recover any part of the rent charge out of the hereditaments released, without prejudice nevertheless to the rights of all persons interested in the hereditaments remaining unreleased, and not concurring in or confirming the release." And if the grantee of a rent charge conveys part of it to a stranger, an apportionment will take place (*e*). 66.

Apportion-  
ment of  
sums peri-  
odically  
payable as  
rents or  
annuities,  
or other-  
wise.

At common law, if a tenant for life died before the day on which the rent became due, where the lease determined by the death of the tenant for life, his executors could not claim an apportionment of rent; nor could the remainder-

(*a*) See Litt. 222; Co. Litt. 147 b; 3 Cruise T. 28, c. 3, § 13, 14; Burton, § 1121; 3 Jarm. & Byth. by Sweet, 60.

(*b*) 2 Jarm. & Byth. by Sweet, 60; *Dennett v. Pass*, 1 Bing. N. C. 388; 1 C. R. (N. S.) 218.

(*c*) Co. Litt. 149 b; Burton, § 1121.

(*d*) Co. Litt. 148 a; 2 Pres. Shep. 345; 3 Cruise T. 28, c. 3, § 16; Burton, § 1123; 2 Jarm. & Byth. by Sweet, 60; 9 Id. 815.

(*e*) 3 Cruise T. 28, c. 3, § 20, 21.

man or reversioner claim that part of it which accrued during the life of the tenant for life ; so that the tenant paid nothing (a). This and similar evils have been remedied by certain enactments, providing that all periodical payments shall be apportioned, so that on the determination of the interest of the person entitled to them, he or his executors, administrators, or assigns, shall have a proportionate part thereof. Thus, it was enacted by the statute 11 Geo. 2, c. 19, s. 15, "that, where any tenant for life shall happen to die before or on the day on which any rent was reserved or made payable upon any demise or lease of any lands, tenements, or hereditaments, which determined on the death of such tenant for life, the executors or administrators of such tenant for life shall and may, in an action on the case, recover of and from such under-tenant or under-tenants of such lands, tenements, or hereditaments, if such tenant for life die on the day on which the same is made payable, the whole, or, if before such day, then a proportion, of such rent according to the time such tenant for life lived, of the last year, or quarter of a year, or other time in which the said rent was growing due as aforesaid, making all just allowances, or a proportionable part thereof respectively." 67.

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CH. 2, s. 2.

Apportion-  
ment Act of  
11 Geo. 2,  
c. 19.

The Court of Chancery extended this statute to the executors of a tenant in tail who died without issue some days before the rent became due (b). 68.

By the statute 4 & 5 Will. 4, c. 22, s. 1, after reciting the above enactment, it is enacted that "rents reserved and made payable on any demise or lease of lands, tenements, or hereditaments which have been and shall be made, and which leases or demises determined or shall determine on the death of the person making the same (although such person was not strictly tenant for life thereof), or on the

Apportion-  
ment Act of  
4 & 5 Will  
c. 22.

(a) 3 Cruise T. 28, c. 3, § 38

(b) 3 Cruise T. 28, c. 3, § 41.

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death of the life or lives for which such person was entitled to such hereditaments, shall, so far as respects the rents reserved by such leases, and the recovery of a proportion thereof by the person granting the same, his or her executors or administrators (as the case may be), be considered as within the provisions of the said recited Act." And by s. 2, "that, from and after the passing of this Act, all rents service reserved on any lease by a tenant in fee or for any life interest, or by any lease granted under any power (a) (and which leases shall have been granted after the passing of this Act), and all rents charge and other rents, annuities, pensions, dividends, moduses, compositions, and all other payments of every description, in the United Kingdom of Great Britain and Ireland, made payable or coming due at fixed periods under any instrument that shall be executed after the passing of this Act, or (being a will or testamentary instrument) that shall come into operation after the passing of this Act, shall be apportioned so and in such manner that on the death of any person interested in any such rents, annuities, pensions, dividends, moduses, compositions, or other payments as aforesaid, or in the estate, fund, office, or benefice from or in respect of which the same shall be issuing or derived, or on the determination by any other means whatsoever of the interest of any such person, he or she, and his or her executors, administrators, or assigns (b) shall be entitled to a proportion of such rents, annuities, pensions, dividends, moduses, compositions, and other payments, according to the time which shall have elapsed from the commencement or last period of payment thereof respectively (as the case may be), including the day of the death of such person, or of the determination of his

(a) See *Plummer v. Whiteley*, 1 Johns. 585.

(b) This Act does not apply between a mortgagor and a mort-

gagee not in possession. He is not an assign. *In re Marquis of Anglesey's Estate*, L. R. 17 Eq. 283.

or her interest, all just allowances and deductions in respect of charges on such rents, annuities, pensions, dividends, moduses, compositions, and other payments being made; and that every such person, his or her executors, administrators, and assigns, shall have such and the same remedies at law and in equity for recovering such apportioned parts of the said rents, annuities, pensions, dividends, moduses, compositions, and other payments, when the entire portion of which such apportioned part shall form part shall become due and payable, and not before, as he, she, or they would have had for recovering and obtaining such entire rents, annuities, pensions, dividends, moduses, compositions, and other payments if entitled thereto, but so that persons liable to pay rents reserved by any lease or demise, and the lands, tenements, and hereditaments comprised therein, shall not be resorted to for such apportioned parts specifically as aforesaid, but the entire rents of which such portions shall form a part shall be received and recovered by the person or persons who if this Act had not passed would have been entitled to such entire rents; and such portions shall be recoverable from such person or persons by the parties entitled to the same under this Act in any action or suit at law or in equity." But by s. 3, these provisions "shall not apply to any case in which it shall be expressly stipulated that no apportionment shall take place, or to annual sums made payable in policies of assurance of any description." 69.

Where the interest mentioned in the second section has determined, whether by death or otherwise, there will be an apportionment. But "the death" spoken of means death occasioning a determination of interest; and therefore, where the interest has not determined, though the person to whom the money was payable has died, there will be no apportionment. So that where such person is tenant for life, remainder to his first and other sons in tail,

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remainder to himself in fee, and he dies without issue, there will be no apportionment as between his personal representatives and his heir (a). The Apportionment Act, 1870, applies to all cases, whether the instrument under which the question arises came into operation before or after the passing of the Act (b). 70.

The income arising from personalty specifically bequeathed is not apportionable under the Apportionment Act, 1870, as between the specific legatee and the estate of the testator (c). 71.

By s. 86 of the Tithe Commutation Act, 6 & 7 Will. 4, c. 71, these provisions are extended to rent charges under that Act; and by s. 50 of the Copyhold Enfranchisement Act, 4 & 5 Vict. c. 35, the same provisions are extended to rent charges under that Act. 72.

Apportion-  
ment Act of  
1870.

By the statute 33 & 34 Vict. c. 35 (passed 1st August, 1870), it is enacted as follows:—

“1. This Act may be cited for all purposes as ‘The Apportionment Act, 1870.’” 73.

Apportion-  
ment of  
rents and  
periodical  
payments.

“2. From and after the passing of this Act all rents, annuities, dividends, and other periodical payments in the nature of income (whether reserved or made payable under an instrument in writing or otherwise) shall, like interest on money lent, be considered as accruing from day to day, and shall be apportionable in respect of time accordingly” (d). 74.

How appor-  
tioned part  
payable.

“3. The apportioned part of any such rent, annuity, dividend, or other payment shall be payable or recoverable in the case of a continuing rent, annuity, or other such payment when the entire portion of which such apportioned

(a) *Re Clulow's Estates*, 3 K. & L. R. 16 Eq. 528.  
J. 689.

(b) *In re Cline's Estate*, L. R. 8 Ch. Ap. 433; *Jones v. Ogle*, L. R. 8 Ch. Ap. 192; *Capron v. Capron*, L. R. 17 Eq. 288.

(c) *Whitehead v. Whitehead*,

(d) See *Clive v. Clive*, L. R. 7 Ch. Ap. 433; *Jones v. Ogle*, L. R. 8 Ch. Ap. 192; *Capron v. Capron*, L. R. 17 Eq. 288.

part shall form part shall become due and payable, and not before, and in the case of a rent, annuity, or other such payment determined by re-entry, death, or otherwise when the next entire portion of the same would have been payable if the same had not so determined, and not before." 75.

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"4. All persons and their respective heirs, executors, administrators, and assigns, and also the executors, administrators, and assigns respectively of persons whose interests determine with their own deaths, shall have such or the same remedies at law and in equity for recovering such apportioned parts as aforesaid when payable (allowing proportionate parts of all just allowances) as they respectively would have had for recovering such entire portions as aforesaid if entitled thereto respectively; provided that persons liable to pay rents reserved out of or charged on lands or other hereditaments of any tenure, and the same lands or other hereditaments, shall not be resorted to for any such apportioned part forming part of an entire or continuing rent as aforesaid specifically, but the entire or continuing rent, including such apportioned part, shall be recovered and received by the heir or other person who, if the rent had not been apportionable under this Act, or otherwise, would have been entitled to such entire or continuing rent, and such apportioned part shall be recoverable from such heir or other person by the executors or other parties entitled under this Act to the same by action at law or suit in equity." 76.

Remedies.

Proviso as  
to rents re-  
served in  
certain  
cases.

The principle of the Apportionment Act, 1870, is this, that where a person has a limited interest in a fund, and his estate determines between two periods of payment, the new owner is not entitled to the whole of the income since the last period of payment (a). 76a.

"5. In the construction of this Act—

"The word 'rents' includes rent service, rent charge,

Interpreta-  
tion of  
terms.

(a) *Bacon, V.-C., in Re Clarke, Barker v. Perowne*, L. R. 18 Ch. D. 163.

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and rent seek, and also tithes and all periodical payments or renderings in lieu of or in the nature of rent or tithe." 77.

"The word 'annuities' includes salaries and pensions." 78.

"The word 'dividends' includes (besides dividends strictly so called) all payments made by the name of dividend, bonus, or otherwise out of the revenue of trading or other public companies, divisible between all or any of the members of such respective companies, whether such payments shall be usually made or declared at any fixed times or otherwise; and all such divisible revenue shall, for the purposes of this Act, be deemed to have accrued by equal daily increment during and within the period for or in respect of which the payment of the same revenue shall be declared or expressed to be made, but the said word 'dividend' does not include payments in the nature of a return or reimbursement of capital." 79.

Act not to  
apply to  
policies of  
assurance;

"6. Nothing in this Act contained shall render apportionable any annual sums made payable in policies of assurance of any description." 80.

nor where  
stipulation  
made to the  
contrary.

"7. The provisions of this Act shall not extend to any case in which it is or shall be expressly stipulated that no apportionment shall take place." 81.

Where an  
annuity  
exists,  
though a  
rent charge  
is deter-  
mined.

Where a rent charge determines by the act of God or of the law, before the expiration of the period for which it was granted, the grantee may still be entitled to an annuity for that period; as where a tenant for another's life grants a rent charge for twenty-one years, and the cestui que vie dies before the term expires; or where the land out of which the rent charge is granted is evicted by an elder title (a). 82.

By the Statute of Limitations, 3 & 4 Will. 4, c. 27, s. 42,

(a) Co. Litt, 148 a.



"no arrears of rent or of interest in respect of any sum of money charged upon or payable out of any land or rent, or in respect of any legacy, or any damages in respect of such arrears of rent or interest, shall be recovered by any distress, action, or suit but within six years next after the same respectively shall have become due, or next after an acknowledgment of the same in writing shall have been given to the person entitled thereto, or his agent, signed by the person by whom the same was payable, or his agent." And by s. 1, "rent" is to extend to "all heriots, and to all services and suits for which a distress may be made, and to all annuities and periodical sums of money charged upon or payable out of any land (except moduses or compositions) belonging to a spiritual or eleemosynary corporation sole." **83.**

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Arrears of  
rent, etc.

Where trustees are directed to pay an annuity to a person for life out of rents, it may often be doubtful, upon the whole will, whether the annuity is or is not a charge upon the corpus of the estate, so that if the current rents prove insufficient to pay the annuity, the representatives of the annuitant may or may not be entitled to have the deficiency made up out of the rents accruing subsequently to the annuitant's decease, or raised by a sale or mortgage of the estate. Care should therefore be taken to prevent such questions from arising (a). **84.**

Whether an  
annuity  
payable out  
of real estate  
is a charge  
on the  
corpus of  
the estate  
or on the  
current  
income  
alone.

It would seem that the following propositions may be laid down in relation to this point: 1. Where a testator makes a devise in fee subject to the payment of an annuity, that annuity is a charge on the corpus of the estate, in case the current rents are insufficient (b). 2. Where an annuity is directed to be paid out of the rents, it will not

(a) See *Foster v. Smith*, 1 Ph. 629; *Forbes v. Richardson*, 11 Hare, 354.

(b) *Stamper v. Pickering*, 9 Sim.

176; *Pickard v. Michel*, 14 Beav. 103; see also the remarks of the Master of the Rolls, in *Philipps v. Philipps*, 8 Beav. 198.

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usually be a charge upon the corpus ; if at least the estate, after the death of the annuitant, is limited over to other persons (a). 3. Where an annuity is charged on real estate, and power is given to the annuitant to enter and distrain and sell, for payment of the arrears of the annuity, it is a charge on the corpus of the estate (b). 85.

Priority

Where several rent charges are given by will, and the estate proves insufficient to pay them all, they must abate *pari passu*, unless the testator has clearly manifested his intention to create a priority in favour of any of them. And where, after the creation of trusts for payment of a rent charge, the testator gives another rent charge "subject to the trusts aforesaid," these words do not give priority to the first rent charge (c). 86.

Remedies  
for recovery  
of annual  
sums  
charged on  
land.

[And now by stat. 44 & 45 Vict. c. 41 (Appendix), s. 44, it is enacted that "(1) Where a person is entitled to receive out of any land, or out of the income of any land, any annual sum, payable half-yearly or otherwise, whether charged on the land or on the income of the land, and whether by way of rent charge or otherwise, not being rent incident to a reversion, then, subject and without prejudice to all estates, interests, and rights having priority to the annual sum, the person entitled to receive the same shall have such remedies for recovering and compelling payment of the same as are described in this section, as far as those remedies might have been conferred by the instrument under which the annual sum arises, but not further. (2) If at any time the annual sum or any part thereof is unpaid for twenty-one days next after the time appointed for any payment in respect thereof, the person entitled to receive the annual sum may enter into and distrain

(a) *Foster v. Smith*, 1 Ph. 629 ;  
*Philipps v. Philipps*, 8 Beav. 193 ;  
*Forbes v. Richardson*, 11 Hare, 357  
—8 ; but see *Ex parte Wilkinson*.  
3 De G. & Sm. 633.

(b) *Byam v. Sutton*, 19 Beav.  
556.

(c) *Coore v. Todd*, 23 Beav. 92  
7 D. M. & G. 520.

[on the land charged or any part thereof, and dispose according to law of any distress found, to the intent that thereby or otherwise the annual sum and all arrears thereof, and all costs and expenses occasioned by non-payment thereof, may be fully paid. (3) If at any time the annual sum or any part thereof is unpaid for forty days next after the time appointed for any payment in respect thereof, then, although no legal demand has been made for payment thereof, the person entitled to receive the annual sum may enter into possession of and hold the land charged or any part thereof, and take the income thereof, until thereby or otherwise the annual sum and all arrears thereof due at the time of his entry, or afterwards becoming due during his continuance in possession, and all costs and expenses occasioned by nonpayment of the annual sum, are fully paid ; and such possession when taken shall be without impeachment of waste. (4) In the like case the person entitled to the annual charge, whether taking possession or not, may also by deed demise the land charged, or any part thereof, to a trustee for a term of years, with or without impeachment of waste, on trust, by mortgage, or sale, or demise, for all or any part of the term, of the land charged, or of any part thereof, or by receipt of the income thereof, or by all or any of those means, or by any other reasonable means, to raise and pay the annual sum and all arrears thereof due or to become due, and all costs and expenses occasioned by nonpayment of the annual sum, or incurred in compelling or obtaining payment thereof, or otherwise relating thereto, including the costs of the preparation and execution of the deed of demise, and the costs of the execution of the trusts of that deed ; and the surplus, if any, of the money raised, or of the income received, under the trusts of that deed shall be paid to the person for the time being entitled to the land therein comprised in reversion immediately expectant on the term thereby

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[created. (5) This section applies only if and as far as a contrary intention is not expressed in the instrument under which the annual sum arises, and shall have effect subject to the terms of that instrument and to the provisions therein contained. (6) This section applies only where that instrument comes into operation after the commencement of this Act." **86a.**

Redemption  
of quit rents  
and other  
perpetual  
charges.

And by s. 45, that "(1) Where there is a quit rent, chief rent, rent charge, or other annual sum issuing out of land (in this section referred to as the rent), the Copyhold Commissioners shall at any time, on the requisition of the owner of the land, or of any person interested therein, certify the amount of money in consideration whereof the rent may be redeemed. (2) Where the person entitled to the rent is absolutely entitled thereto in fee simple in possession, or is empowered to dispose thereof absolutely, or to give an absolute discharge for the capital value thereof, the owner of the land, or any person interested therein, may, after serving one month's notice on the person entitled to the rent, pay or tender to that person the amount certified by the Commissioners. (3) On proof to the Commissioners that payment or tender has been so made, they shall certify that the rent is redeemed under this Act; and that certificate shall be final and conclusive, and the land shall be thereby absolutely freed and discharged from the rent. (4) Every requisition under this section shall be in writing; and every certificate under this section shall be in writing, sealed with the seal of the Commissioners. (5) This section does not apply to tithe rent charge, or to a rent reserved on a sale or lease, or to a rent made payable under a grant or license for building purposes, or to any sum or payment issuing out of land not being perpetual. (6) This section applies to rents payable at, or created after, the commencement of this Act. (7) This section does not extend to Ireland." **86b.**

## SECTION III.

*Of Advowsons.*

An advowson is a right of presentation to an ecclesiastical benefice from time to time, whenever a vacancy occurs (a). **87.**

The right of presentation and the right of nomination to a church are distinct things. Presentation is the offering a clerk to the bishop; nomination is the offering a clerk to the patron. These rights may exist in different persons at the same time. Thus, a person seised of an advowson may grant to A. and his heirs, that whenever the church becomes vacant, he will present to the bishop such person as A. or his heirs shall nominate (b). Where the legal estate in an advowson is vested in trustees, the right of presentation, as incident to the legal estate, is in them, but the right of nomination, as the really beneficial right, is in the cestui que trust. So, in the case of a mortgage of an advowson, the mortgagee has the right of presentation, but the mortgagor has the right of nomination (c). **88.**

Advowsons are either appendant or in gross. An advowson appendant is one that was annexed to the ownership of the demesnes of a manor, by the lord of which the church was founded, and has been so annexed ever since the foundation of the church. And in consequence of such annexation, this will pass together with the manor, by a grant of the manor only, without adding any other words (d). And where an advowson has passed immemorially with the manor, without any express words to include it, or with only the words "with the appurtenances," it is to be taken as an advowson

Definition.

Right of presentation and right of nomination distinguished.

Trustees and mortgagees have the right of presentation; cestuis que trust and mortgagors the right of nomination.

Advowson appendant or in gross. Advowson appendant.

(a) Co. Litt. 17 b, 119 b; 3 Cruise T. 21, c. 1, § 4; 2 Bl. Com. 21. see infra, Part II. T. 10, Ch. 2, s. 1, No. II.

(b) 3 Cruise T. 21, c. 1, § 6.

(d) 2 Bl. Com. 22; 3 Cruise T.

(c) 3 Cruise T. 21, c. 1, § 7; and 21, c. 1, § 9.

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Advowson  
in gross.

appendant (*a*). An advowson in gross is one that is separated, or has once been separated, by legal conveyance, from the ownership of the manor by the lord of which the church was founded (*b*). 89.

How an  
advowson  
may become  
in gross.

An advowson appendant may become in gross by various means: Thus, 1. If the manor to which it is appendant is conveyed away in fee simple, with an exception of the advowson. 2. If the advowson is conveyed away without the manor to which it is appendant. 3. If the proprietor of an advowson presents to it as an advowson in gross. Or, 4. Where a manor to which an advowson is appendant descends to coparceners, who make partition of the manor, with an express exception of the advowson (*c*). 90.

Advowson  
ceasing to  
be append-  
ant for a  
time only.

An advowson may cease to be appendant for a time, and yet become again appendant. Thus, if an advowson is excepted in a lease for life of a manor, it becomes in gross during the continuance of the lease; but upon the expiration of the lease it again becomes appendant. So, if an advowson appendant is granted to a person for life, it becomes in gross. But if afterwards another person were enfeoffed of the manor to which it was appendant, with the appurtenances, in fee simple, the reversion of the advowson would pass, and at the expiration of the grant for life, it would again become appendant (*d*). So, if a manor to which an advowson is appendant descends to two coparceners, and upon a partition the advowson is allotted to one and the manor to the other, the advowson becomes an advowson in gross; but if the coparcener to whom the advowson was allotted dies without issue and without disposing of the advowson, it will descend to the other, and again become appendant (*e*). 91.

Advowson  
appendant

An advowson may be appendant for one turn and in gross

(*a*) 3 Cruise T. 21, c. 1, § 9.

(*c*) 3 Cruise T. 21, c. 1, § 13, 14.

(*b*) 2 Bl. Com. 22; 3 Cruise T.  
21, c. 1, § 12.

(*d*) 3 Cruise T. 21, c. 1, § 15.

(*e*) 3 Cruise T. 21, c. 1, § 16.

for another. Thus, if a person having an advowson appendant grants every second presentation to a stranger, it will be in gross for the turn of the grantee, and appendant for the turn of the grantor (*a*). 92.

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for one turn  
and in gross  
for another.

Advowsons are also presentative, collative, and donative. An advowson presentative is that in which the patron has a right to present a clerk to the bishop or ordinary, and to demand of him to institute the clerk, if duly qualified, that is, to commit to the clerk the cure of souls (*b*). Since the Statute of Frauds (*c*), it is necessary that all presentations be in writing. And a presentation in writing is a kind of letter, not a deed, from the patron to the bishop of the diocese in which the benefice is situated, requesting him to admit to the church the person presented (*d*). And it may be revoked or varied at any time before institution (*e*). An advowson collative is that in which, the bishop being himself the patron, no presentation takes place, but the clerk obtains the benefice by one single act of collation whereby the bishop confers the benefice. An advowson donative is that which exists where the Queen, or any subject by her license, founds a church or chapel, and ordains that it shall be merely in the gift or disposal of the patron, subject to his visitation only, not to that of the ordinary, and vested absolutely in the clerk by the patron's deed of donation, without presentation, institution, or induction (*f*). If the patron of an advowson donative once presents to the ordinary, and allows of the admission of his clerk thereon, he thereby renders his church always presentable, and it will never afterwards be donative (*g*). 93.

Advowson  
presentative,  
collative,  
and  
donative.

Advowson  
presentative.

Advowson  
collative.

Advowson  
donative.

Institution or collation must be followed by induction, Induction.

(*a*) 3 Cruise T. 21, c. 1, § 17.

Burn's Eccles. Law, 9th ed. 151.

(*b*) 3 Cruise T. 21, c. 1, § 19, and c. 2, § 2, 5.

(*f*) 3 Cruise T. 21, c. 1, § 20, 21 ; Co. Litt. 344 a.

(*c*) 29 Car. 2, c. 3, s. 4.

(*g*) 3 Cruise T. 21, c. 2, § 8 ; Co.

(*d*) 3 Cruise T. 21, c. 2, § 2.

Litt. 344 a ; 1 Burn's Eccles. Law, 9th edit. 169.

(*e*) 3 Cruise T. 21, c. 2, § 3 ; 1

**PART I. T. 2.** that is, the investing the clerk with full possession of all  
**CH. 2, s. 3.** the profits belonging to the church (*a*). 94.

Kinds of  
 estates in an  
 advowson.

A person may be tenant in fee of an advowson; in which case he and his heirs have a perpetual right of presentation. It may also be entailed within the statute De Donis (*b*), or may be limited to a person for life or years, in possession, remainder, or reversion. And it may be held in joint tenancy, coparcenary, and common (*c*). An estate by the curtesy may also be had in an advowson, even though the church be not void during the coverture (*d*). And if a man seised of an advowson in fee marries, his wife acquires a title to the third presentation, as her dower (*e*). 95.

How an advowson may be aliened.

An advowson appendant may be aliened by any kind of conveyance that transfers the manor to which it is appendant. An advowson in gross may also be aliened by deed (*f*). 96.

Grant of the next or any number of presentations.

Not only may an advowson be aliened in fee, or for life, or for years, but the next presentation or any number of presentations may also be granted away (*g*). And the next presentation, when granted away, is considered as a chattel real, which, if not disposed of by the grantee in his lifetime, will vest in his executors (*h*). 97.

Reserving next presentation.

A person cannot grant an advowson, reserving the presentation for his life (*i*). 98.

Owner of advowson cannot grant glebe or tithes.

The owner of an advowson cannot grant the glebe lands or the tithes as a distinct property. They are inseparably annexed to the advowson, and belong to the incumbent for the time being (*k*). 99.

To what extent an

Where a person has only a particular estate in a manor

- |  |  |
|--|--|
| ( <i>a</i> ) 3 Cruise T. 21, c. 1, § 22.                 | ( <i>f</i> ) 3 Cruise T. 21, c. 1, § 31.   |
| ( <i>b</i> ) 3 Cruise T. 21, c. 1, § 24.                 | ( <i>g</i> ) 3 Cruise T. 21, c. 1, § 32; 1 |
| ( <i>c</i> ) 3 Cruise T. 21, c. 1, § 25.                 | Pres. Shep. T. 96.                         |
| ( <i>d</i> ) 3 Cruise T. 21, c. 1, § 26; Co. Litt. 29 a. | ( <i>h</i> ) 3 Cruise T. 21, c. 2, § 21.   |
| ( <i>e</i> ) 3 Cruise T. 21, c. 1, § 30.                 | ( <i>i</i> ) 1 Pres. Shep. T. 79.          |
|  | ( <i>k</i> ) 1 Pres. Shep. T. 96.          |



to which an advowson is appendant, he can of course only alien the advowson for so long as his estate shall continue. And where a tenant in tail of a manor to which an advowson was appendant granted the next avoidance of the advowson, and died, the issue entered on the manor, and the grant was held to be void. And where a tenant in tail and his son joined in a grant of the next avoidance of a church, and the tenant in tail died, it was held that the grant was void against the son and heir who joined in the grant, because he had nothing in the advowson at the time of the grant, neither in possession, nor in right, nor in actual possibility (a). 100.

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advowson may be aliened by a person having only a particular estate in a manor to which it is appendant.

Grant by a tenant in tail and his son of the next avoidance.

Advowson is assets for payment of debts.

Devolution of the right of presentation.

Presentation where an advowson is held in joint tenancy, in coparcenary, or in common.

An advowson in gross, whether the proprietor has a legal or an equitable interest therein, is assets for payment of debts, and will be directed to be sold for that purpose (b). 101.

Where a person is seised of an advowson, and the church becomes vacant in his lifetime, if he dies before he has presented, the right of presentation devolves to his executors or administrators, because it is considered as a chattel real. But if the incumbent of a church is also seised in fee of the advowson of the same church and dies, the right to present will devolve to his heir, and not to his executor; for the avoidance and descent to the heir happening at the same instant, the title of the heir shall be preferred (c). 102.

Where an advowson is held in joint tenancy, all the joint tenants must join in the presentation. And where an advowson is vested in trustees and their heirs, upon trust to present to the church whenever a vacancy happens, they are joint tenants, and therefore upon any avoidance they must all join in the presentation (d). By the common

(a) 3 Cruise T. 21, c. 1, § 36, 37, 38.

(c) 3 Cruise T. 21, c. 2, § 20.

(b) 3 Cruise T. 21, c. 1, § 40; Co.

(d) 3 Cruise T. 21, c. 2, § 25.

PART I. T. 2, law, where an advowson descends to coparceners, and they  
 CH. 2, s. 3.

cannot agree to present jointly, the eldest sister shall have the first turn, the second the next, and so of the rest, according to their seniority. And this privilege extends not only to the heirs of each coparcener, but also to others who acquire a portion of the estate by conveyance or by act of law, as a tenant by the curtesy, who shall have the same privilege by presenting in turn as his wife would have had if alive (a). Tenants in common of an advowson must all join in presenting to a church (b). 103.

By the stat. 7 Ann, c. 18, s. 2, it is enacted, "that, if coparceners, or joint tenants, or tenants in common be seised of an estate of inheritance in the advowson of any church or vicarage, or other ecclesiastical promotion, and a partition is or shall be made between them to present by turns, thereupon every one shall be taken and adjudged to be seised of his or her separate part of the advowson to present in his or her turn " (c). 104.

Grant and  
 devisees of  
 advowsons,  
 etc., of  
 papists.]

By the stat. 11 Geo. 2, c. 17, s. 5, every grant, after the 6th May, 1738, of any advowson, or right of presentation, collation, nomination, or donation, of or to any benefice by any papist or any mortgagee or trustee of any papist, shall be void, unless made bonâ fide, and for a full and valuable consideration to a protestant purchaser, and merely for the benefit of a protestant. And every devise after that day by any papist, of any such advowson, or right of presentation, etc., with intent to secure the benefit thereof to the heirs or family of such papist, shall be void. 105.

(a) 3 Cruise T. 21, c. 2, § 27.

(b) 3 Cruise T. 21, c. 2, § 32.

(c) 3 Cruise T. 21, c. 2, § 34.

## SECTION IV.

*Of Tithes.*

Tithe is a right to the tenth part of the increase yearly arising and accruing from the profits of lands, the stock upon lands, and the personal industry of the inhabitants ; the first species being usually called predial, as of corn, grass, hops, and wood ; the second mixed, as of wool, milk, pigs, etc. ; and the third, personal, as of manual occupation (a). 106.

Tithes are due as of common right to the rector of the parish, that is, either the actual incumbent, or the impro- priator of the benefice, unless there is a special exemption, by a real composition, or by custom, or by prescription (b) ; and no tithes belong de jure to the vicar, except on an endowment or by prescription. So that the rector, whether clerical or lay, is *prima facie* entitled to all the tithes of the parish (c). But it sometimes happens that a person who is neither rector, clerical or lay, nor vicar of a parish, has a certain part of the tithes within that parish, which is called a portion of tithes, and the person entitled to it is called a portionist (d). And lords of manors may be entitled to the tithes by prescription (e). 107.

When the monasteries were dissolved by King Henry VIII., the appropriation of the several benefices which belonged to them would by the rules of the common law have ceased, and they would have become disappropriated, had not a clause been inserted in all the statutes by which the monasteries were given to the Crown, to vest such

(a) 2 Bl. Com. 24.

(c) 3 Cruise T. 22, § 55.

(b) 2 Bl. Com. 28. As to these modes or grounds of exemption, see Id. 28—32.

(d) 3 Cruise T. 22, § 59.

(e) 3 Cruise T. 22, § 61.

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appropriated benefices in the King in as ample a manner as the monasteries held them (*a*). Almost all these appropriated benefices have been granted by the Crown to lay persons, and are now held by their descendants, or by those who have purchased them from such grantees or their descendants. These are called lay impropriators (*b*). The grants made by the Crown of this kind of property are either of a rectory or parsonage, which comprises the parish church, with all its rights, glebes, tithes, and other profits whatsoever, or else of the tithes of a particular tract of land (*c*). 108.

Estates in  
tithes in  
lay hands,  
and aliena-  
tion thereof.

With respect to the estate which lay impropriators are capable of having in tithes, they may be tenants in fee simple, fee tail, for life, or for years. Husbands may be tenants by the curtesy, and widows may be endowed of them. These tithes may also be held in joint tenancy, coparcenary, or in common (*d*). Estates in them are also accounted assets for payment of debts. And they are alienable by lay impropriators, in the same manner as other real estates in incorporeal hereditaments, and are comprehended within the Statute of Uses under the word hereditaments. Indeed they have all other incidents belonging to temporal inheritances. But it should be observed that no good title can be made to tithes, without showing the grant to some layman by royal letters patent, of the tithes or the rectory or parsonage to which they are annexed; for this is the only mode of repelling any claim which may be made to those tithes by an ecclesiastical person claiming *jure ecclesiæ*. And the letters patent should be inspected, to see that no reversion remains in the Crown (*e*). 109.

Title to  
them.

Commuta-  
tion of

Under the stat. 6 & 7 Will. 4, c. 71, and the subsequent

(*a*) 3 Cruise T. 22, § 62.

(*b*) 3 Cruise T. 22, § 63.

(*c*) 3 Cruise T. 22, § 64.

(*d*) 3 Cruise T. 22, § 67.

(*e*) 3 Cruise T. 22, § 69.

Acts (a), tithes, or customary payments in lieu thereof, are commuted for a rent charge regulated by the price of corn (b); or (except in the case of a lay impropriator) for land to the extent of twenty acres (c). And the tithe rent charge is to be subject to the same incumbrances and incidents as tithes before the Act. But it is provided that a person who at law or in equity is tenant in tail, or is alone or jointly tenant in fee, or has power to acquire or dispose of the fee simple, of any tithes or tithe rent charge in possession, or is tenant for life thereof and of the lands subject thereto, where both are settled to the same uses, may merge the tithes or tithe rent charge, by any unstamped deed or declaration under his hand and seal, confirmed by the Commissioners, of whatever tenure the lands may be. Thus, by s. 71, it is enacted, "that it shall be lawful for any person seised in possession of an estate in fee simple or fee tail of any tithes or rent charge in lieu of tithes, by any deed or declaration under his hand and seal, to be made in such form as the Commissioners shall approve, and to be confirmed under their seal, to release, assign, or otherwise dispose of the same, so that the same may be absolutely merged and extinguished in the freehold and inheritance of the lands on which the same shall have been charged." And by the stat. 1 & 2 Vict. c. 64, s. 1, this provision is extended thus: "it shall be lawful for any person or persons who shall, either alone or together, be

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tithes.

Merger of  
tithes or  
tithe rent  
charges.

(a) See the following statutes on the same subject:—7 W. 4 & 1 V. c. 69; 2 & 3 V. c. 62; 3 & 4 V. c. 15; 5 & 6 V. c. 54; 9 & 10 V. c. 73; 10 & 11 V. c. 104; 14 & 15 V. c. 53; 16 & 17 V. c. 124; 23 & 24 V. c. 93. By this last statute, corn rents under local acts in lieu of tithes may be converted into rent charges (s. 1). And provisions are made for the apportionment of such

rent charges (ss. 4—17). And rates per head in lieu of tithes may also be converted into rent charges (ss. 18, 25). And rent charges on commons may be commuted for a part of the land, or redeemed (s. 20).

(b) See in particular, ss. 17, 36, 44.

(c) See ss. 29, 62, and stat. 2 & 3 V. c. 62, s. 19, and stat. 5 & 6 V. c. 54, s. 6.

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seised of or have the power of acquiring or disposing of the fee simple in possession of any tithes or rent charge in lieu of tithes, by any deed or declaration under his or their hand and seal or hands and seals, to be made in such form as the Tithe Commissioners for England and Wales (a) shall approve, and to be confirmed under their seal, to convey, appoint, or otherwise dispose of the same, so that the same may be absolutely merged and extinguished in the freehold and inheritance of the lands out of or on which the same shall have been issuing or charged; and every such deed or declaration as aforesaid shall be valid and effectual for the purpose aforesaid, although the same may not be executed or made in the manner or with the formalities or requisites which if this Act had not been passed would have been essential to the validity of any instrument by which such person or persons could have acquired or disposed of the fee simple in possession of such tithes or rent charge in lieu of tithes." And by s. 2, "no deed or declaration authorised by this Act for the merging of tithes shall be chargeable with any stamp duty." And by s. 3, "in all cases where tithes, or rent charge in lieu of tithes, and the lands out of which the same are payable, are both settled to the same uses, it shall be lawful for any person in possession of an estate for life in both such lands and tithes, or rent charge in lieu of tithes, by any deed or declaration under his hand and seal, to be made in such form as the said Commissioners shall approve, and to be confirmed under their seal, to release, assign, or otherwise dispose of such tithes or rent charge, so that the same may be absolutely merged and extinguished in the freehold and inheritance of the lands out of which such tithes shall have been issuing or on which such rent charge shall have been charged." And by s. 4, these provisions as to merger

(a) Now styled the Land Commissioners for England, by virtue of stat. 45 & 46 Vict. c. 38, s. 48, in Appendix.

are extended to "all lands being copyhold of inheritance or copyhold for lives or of any other tenure whatsoever." 110.

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By the stat. 9 & 10 Vict. c. 73, these provisions are further extended. By s. 18, it is enacted, "that where by any agreement or award already made or hereafter to be made a rent charge shall have been agreed or awarded to be paid instead of the tithes of any parish, or instead of any such tithes, and shall not have been apportioned, it shall be lawful for the person who under the provisions of the said recited Acts would have been enabled, in case such agreement or award had not been made, to merge the tithes in lieu of which such rent charge shall have been agreed or awarded to be paid, or such of the same tithes as were payable out of part of the said lands, by any deed or declaration, to be made in such form as the Commissioners shall approve, and to be confirmed under their hands and seal, to declare that the tithes which he would have been so entitled to merge shall, so far as respects all the lands, or, if he shall think fit, so far as respects only any specified part of the lands out of which the same were payable, and the rent charge or portion of rent charge which shall have been awarded or ought to be apportioned in lieu thereof on such lands, or specified parts of such lands, as the case may be, shall be merged, and such merger shall take effect accordingly; and in case such merger shall extend to all the lands which would have been chargeable with such rent charge, no apportionment of such rent charge shall be made under the provisions of the said recited Acts, but in case such merger shall extend to part only of the lands which would have been chargeable with such rent charge, then such portion of the rent charge shall be apportioned among the other lands which would have been chargeable with such rent charge, as such other lands would have been subject to in case such merger had not taken place." And by s. 19, "all powers relating to the

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merger and extinguishment of any tithes, or rent charge instead thereof, may be executed by a person entitled in equity to such tithes or rent charge in all respects and with the same consequence as he could have done if he had been legally entitled thereunto; and every instrument already executed and purporting to be made in pursuance of the powers of the said Acts or any of them by any person so entitled in equity shall in every respect be as effectual and have the same consequence as if he had been legally entitled to the said tithes or rent charge at the time of the execution of such instrument, subject nevertheless in every case to any charge, incumbrance, or liability which lawfully or equitably existed on such tithes or rent charge to the extent of the value of such tithes or rent charge; and any such charge, incumbrance, or liability shall have such priority, and the lands and the owners thereof for the time being shall be liable in the same manner in respect of such rent charge, incumbrance, or liability, or of any penalty or damages for non-payment or non-performance thereof respectively, as by the said Act of the session of Parliament held in the second and third years of the reign of her present Majesty is provided in the case of such merger or extinguishment as therein mentioned; and every instrument purporting to merge any tithes or rent charge, and made with the consent of the said Commissioners before the passing of this Act, shall be hereby absolutely confirmed and made valid both at law and in equity in all respects, subject nevertheless to any charge, incumbrance, or liability in all respects as is lastly hereinbefore provided." And by s. 20, the stat. 1 & 2 Vict. c. 64, is to be construed with and as part of the stat. 6 & 7 Will. 4, c. 71, as amended by the several amending Acts. 111.

Preservation  
of charges  
on tithes  
merged

By the stat. 2 & 3 Vict. c. 62, s. 1, lands in which such merger shall take effect shall be subject to any charge, incumbrance, or liability existing on the tithes or tithe



rent charge before the merger, in priority to any charge or incumbrance existing on the lands at the time of the merger :—"In every case where any tithes or rent charge shall have been or shall hereafter be released, assigned, or otherwise conveyed or disposed of under the provisions of the said Acts, or any of them, or of this Act, for merging or extinguishing the same, the lands in which such merger or extinguishment shall take effect shall be subject to any charge, incumbrance, or liability which lawfully existed on such tithes or rent charge previous to such merger, to the extent of the value of such tithes or rent charge ; and any such charge, incumbrance, or liability shall have priority over any charge or incumbrance existing on such lands at the time of such merger taking effect ; and such lands, and the owners thereof for the time being, shall be liable to the same remedies for the recovery of any payment and the performance of any duty in respect of such charge, incumbrance, or liability, or of any penalty or damages for non-payment or non-performance thereof respectively, as the said tithes or rent charge, or the owner thereof for the time being, were or was liable to previous to such merger." 112.

By s. 2 of the same statute, the person merging the tithes or tithe rent charge may apportion such charges, incumbrances, or liabilities on the lands in which the merger shall take effect, or on part of them, or on other lands ; provided the value of the lands to be exclusively charged be of three times the amount of such charges, incumbrances, or liabilities, over and above all other charges and incumbrances affecting the lands charged :—"Every person entitled to exercise the powers for merger of tithes or rent charge in land under the said Acts or any of them, or of this Act, may, with the consent of the Tithe Commissioners (a)

Apportion-  
ment of  
charges on  
tithes  
merged.

(a) Now Land Commissioners, by virtue of stat. 45 & 46 Vict. c. 38, s. 48, in Appendix.

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for the time being under their hands and seal of office, and of the person to whom the lands in which such merger or extinguishment shall take effect shall belong, either by the deed or other instrument or declaration by which such merger shall be effected, or by any separate deed, instrument, or declaration, to be made in such form as the Commissioners shall approve, specially apportion the whole or any part of any such charge, incumbrance, or liability affecting the said tithes or rent charge so merged or extinguished, or proposed to be merged or extinguished in such lands, upon the same or any part thereof, or upon any other lands of such person held under the same title and for the same estate in the same parish, or upon the several closes or portions of such lands, or according to an acreable rate or rates upon lands of different quality, in such manner and proportion, and to the exclusion of such of them, as the person intending to merge the same, with such consent as aforesaid, may, by any such deed, instrument, or declaration direct: Provided always, that no land shall be so exclusively charged, unless the value thereof shall in the opinion of the said Commissioners be at least three times the value of the amount of the charge, incumbrance, or liability charged or intended to be charged thereon, over and above all other charges and incumbrances, if any, affecting the same." And by s. 4, the person entitled to tithes or tithe rent charge may apportion such charge, incumbrance, or liability exclusively on any part of the tithes or tithe rent charge, which is three times the value of such charge, incumbrance, or liability, and which he has not the power or does not intend to merge:—"Where the whole of the great tithes, or the whole of the small tithes, or the respective rent charges in lieu thereof, shall be lawfully subject to any such charge, incumbrance, or liability, and the person entitled to such tithes or rent charge respectively shall be desirous of apportioning such

Apportionment of charges on tithes not merged.

charge, incumbrance, or liability respectively exclusively upon any part of such tithes or rent charge, although such person has not the power, or does not intend to merge the same under the said Acts or this Act, such person may, with the like consent of the said Commissioners, and in such manner as they shall see fit and prescribe, and also with the consent of the bishop of the diocese, specially apportion such charge, incumbrance, or liability respectively upon any part or portion of the tithes or rent charge respectively subject thereto, not being in the opinion of the said Commissioners less than three times the value of the said charge, incumbrance, or liability, or of such part thereof as shall be so apportioned thereon, or intended so to be." 112a.

By s. 6 of the same statute, "the provisions of the said Acts and this Act for merger or extinguishment of tithes or rent charge instead of tithes in the lands out of which such tithes shall have been issuing, or whereon such rent charge shall be fixed, do and shall extend to glebe or other land, in all cases where the same and the tithes or rent charge thereof shall belong to the same person in virtue of his benefice, or of any dignity, office, or appointment held by him." 113.

By the stat. 9 & 10 Vict. c. 73, ss. 1—11, and by the stat. 23 & 24 Vict. c. 93, ss. 20, 31—33, 35—39, power is given to redeem tithe rent charges in certain cases. 114.

Under the Tithe Commutation Act, 6 & 7 Will. 4, c. 71, the Commissioners were only intended to decide disputes between the land owner and the tithe owner, leaving the decision of disputes as to title between rival claimants of the tithe to be decided by the regular tribunals of the country (a). 115.

By the stat. 41 & 42 Vict. c. 42 (8th August, 1878), entitled "An Act to amend and further extend the Acts

(a) *The Queen v. The Tithe Commissioners*, 15 A. & E. 633.

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Merger of  
tithes and  
rent charges  
of glebe.

Redemption  
of tithe rent  
charges.

Jurisdiction  
of the Tithe  
Commutation  
Commissioners.

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for the Commutation of Tithes in England and Wales," it is enacted as follows :

Redemption  
of tithe on  
land re-  
quired for  
public  
purposes.

"1. In all cases where land charged with rent charge in lieu of tithes is taken for any of the following purposes ; that is to say,

"The building of any church, chapel, or other place of public worship ;

"The making of any cemetery or other place of burial ;

33 & 34 Vict.  
c. 75.

"The erection of any school under the Elementary Education Act ;

"The erection of any town hall, court of assize, gaol, lunatic asylum, hospital, or any other building used for public purposes, or in the carrying out of any improvements under the Artizans Dwellings Act, 1875 ;

38 & 39 Vict.  
c. 36.

"The formation of any sewage farm under the provisions of the Sanitary Acts, or the construction of any sewers, or sewage works, or any gas or water works ;

"Or the enlarging and improving of the premises or buildings occupied or used for any of the above-mentioned purposes ;

the person or persons proposing to carry out the above-mentioned works, buildings, or improvements shall, as soon as the said person or persons are in possession of the land, and before the land is applied to any of the purposes aforesaid, apply to the Tithe Commissioners to order the redemption of the rent charge for a sum of money equal to twenty-five times the amount thereof ; and the redemption money, with the expenses incident to the redemption, shall be paid to the said Commissioners within a time to be fixed by such order, or within any enlarged time the Commissioners may appoint, and the Commissioners shall apply such redemption money in the manner provided by the said Acts." 115a.

"2. The application to the said Commissioners in respect of any such land may be signed by the secretary of any company which shall have taken the land, or in the case of a corporation, school, or other board, by the clerk of the said board or corporation, and in every other case by such person or persons as the Commissioners may require." 115b.

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--  
Application  
for redemption.

"3. Whenever land has been charged with any rent charge not exceeding twenty shillings, the Commissioners may, if they see fit, upon the application of the owner of such land or of the person entitled to the rent charge thereon, by an order under their hands and seal, direct that such rent charge shall be redeemed by the payment by or on behalf of the owner of the said land charged therewith, within such time as the Commissioners by such order shall direct and appoint, of a sum of money equal to twenty-five times the amount of such rent charge." 115c.

Redemption  
of tithe not  
exceeding  
twenty  
shillings.

"4. Whenever any land has been charged with a rent charge exceeding twenty shillings, the Commissioners may, if they see fit, upon the joint application of the owner of the land and the person entitled to the rent charge, order such rent charge to be redeemed for a sum not being less than twenty-five times the amount thereof, provided that the bishop of the diocese and the patron of the benefice consent to such redemption, whenever the person entitled to the rent charge is entitled thereto in right of any benefice or cure." 115d.

Redemption  
of tithe  
exceeding  
twenty  
shillings.

"5. Whenever lands charged with rent charge under any instrument of apportionment or altered apportionment shall be divided for building or other purposes into numerous plots, and it shall appear to the Commissioners that no further apportionment of the said rent charge can conveniently be made, the Commissioners may, if they shall see fit, upon the application of the owner or of the person for the time being entitled to the receipt of the said rent charge, and without limitation as to the amount thereof,

Redemption  
of tithe on  
divided  
lands.

**PART I. T. 2, CH. 2, S. 4.** by an order under their hands and seal, direct that such rent charge shall be redeemed by the payment by the owners of the lands chargeable therewith, within such time as the Commissioners shall by such order direct and appoint, of a sum of money not less than twenty-five times the amount of such rent charge." 115e.

Application of existing powers to this Act.

"6. All the powers and provisions of the said recited Acts respecting the redemption of rent charge and the assessment and recovery of redemption money and expenses (except as otherwise by this Act is provided) shall be applicable to all redemptions authorised and effected under this Act." 115f.

Exchange of annual payment for lands or tithe rent charge.

"7. The provisions of the said Acts with reference to the exchange of glebe lands for other lands shall extend to and be deemed to authorise any spiritual person to exchange for lands, or for tithe rent charge, any annual payment or augmentation belonging to him in right of his benefice and charged upon or payable out of any lands or tithe rent charge." 115g.

## SECTION V.

### *Of Commons.*

**PART I. T. 2, CH. 2, S. 5.**

Definition.  
Chiefly of four sorts.

Common is a right or privilege to take or use some portion of that which another's lands, waters, woods, etc., produce (a). It is chiefly of four sorts : common of pasture, of piscary, of turbary, and of estovers (b). 115h.

Common of pasture.

I. The most general and valuable kind of common is that of pasture, which is a right a person has of feeding his beasts in another's lands. This kind of common is of four kinds : appendant, appurtenant, because of vicinage, or in gross (c). 116.

Common appendant.

1. Common appendant is a right annexed to the posses-

(a) 3 Cruise T. 23, § 1.

(b) 2 Bl. Com. 32.

(c) Co. Litt. 122 a ; 3 Cruise T. 23, § 2 ; Burton, § 1133 ; 2 Bl. Com. 33.

sion of land within a manor, by which the owner or occupier of such land is entitled to feed his beasts upon the wastes and upon the lands of other persons within the same manor (*a*). It can only be claimed by prescription (*b*), not by grant or by way of custom (*c*). It is regularly annexed to arable land only. Yet it may be claimed as appendant to a manor, farm, or carve of land, though it contain pasture, meadow, and wood; for it will be presumed to have been all originally arable. But a prescription to have common appendant to a house, meadow, or pasture, is void. It may, however, be appendant to a cottage; for a cottage has at least a curtilage annexed to it (*d*). It can only be claimed for such animals as are necessary to tillage; as horses and oxen to plough the land, and cows and sheep to manure it. It may by usage be limited to any definite number of cattle. But where there is no such usage, it is restrained to cattle levant and couchant upon the land to which the right of common is appendant; and the number of cattle which are allowed to be levant and couchant is ascertained by the number of cattle which can be maintained on the land during the winter (*e*). Such animals being absolutely necessary for agriculture, this right of common for them was annexed by law as an inseparable incident to the grant of land within a manor (*f*).

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Claimed by  
prescription

To what it  
is annexed.

For what  
creatures.

It is of  
common  
right.

2. Common appurtenant does not arise from any connection of tenure, but must be claimed by grant or prescription, and may be annexed to lands lying in different manors from those in which it is claimed, and to any kind of land. It may be not only for beasts usually common-

Common  
appurte-  
nant.  
How  
claimed.  
To what  
annexed.  
For what  
creatures.

(*a*) 3 Cruise T. 28, § 3; Burton, § 1133; 2 Bl. Com. 33.

(*b*) See Title on Prescription, *infra*, Part II. Tit. 5.

(*c*) 3 Cruise T. 23, § 4; Burton, § 1143; Co. Litt. 122 a, n. 2, 4.

(*d*) 3 Cruise T. 23, § 5, 6.

(*e*) 3 Cruise T. 23, § 8, 9; Co. Litt. 122 a; Burton, § 1133, 1136; 2 Bl. Com. 33.

(*f*) 2 Bl. Com. 33; Co. Litt. 122 a.

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able, such as horses, oxen, and sheep, but likewise for goats, swine, etc. And it may be either for a definite or an indefinite number; but where it is for an indefinite number, it is restrained to animals levant and couchant on the land to which it is annexed (a). But common for animals levant and couchant cannot be claimed by prescription as appurtenant to a house without any curtilage or land (b). 118.

Against  
common  
right.

Common appurtenant is against common right (c). 119.

A fold course is not a several right to the herbage, but a right of common appurtenant of pasture for sheep. Lords of Manors can, by the Statute of Merton, approve against common appurtenant of pasture. The proviso in the Statute of Westminster the Second, c. 16, only prevents derogation from an express grant, not from a presumed grant (d). 119a.

When com-  
mon may be  
granted  
over.

Common appendant or appurtenant for all beasts levant and couchant cannot be granted over. But common appurtenant for a limited number may be granted over, and when granted over, it becomes common in gross (e). 120.

Common  
because of  
vicinage.

3. Common because of vicinage is a mutual right arising by prescription, in the inhabitants of adjoining townships or manors, of suffering their cattle to stray into each other's fields without molestation, until either of them shall inclose and exclude the other (f). This species of common is, in fact, only a permissive right intended to excuse what in strictness is a trespass in both, and yet an almost unavoidable trespass, and to prevent a multiplicity of suits. And hence, in the first place, it can only exist between two

(a) 3 Cruise T. 23, § 10, 11; Burton, § 1135, 1136, 1137; 2 Bl. Com. 33; Co. Litt. 122 a, and n. 4; see *Baylis v. Tysan-Amhurst*, L. R. 6 Ch. D. 500.

(b) 3 Cruise T. 23, § 12.

(c) 3 Cruise T. 23, § 43.

(d) *Robinson v. Duleep Singh*. L. R. 11 Ch. D. (Ap.) 798.

(e) 3 Cruise T. 23, § 14, 20; Burton, § 1137.

(f) 2 Bl. Com. 33; 3 Cruise T. 23, § 15, 16, 67; Burton, § 1134 Co. Litt. 122 a.



townships or manors adjoining one another, not where there is intermediate land ; secondly, it does not authorise an inhabitant of one township or manor to put his cattle upon the wastes of the other township or manor ; but he must put them upon the wastes of his own township or manor, from whence they may stray into the wastes of the other (a) ; and, thirdly, it can only be used by cattle levant and couchant upon the lands to which such right of common is annexed (b). 121.

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4. Common in gross is a right which must be claimed by deed or prescription, and has no relation to land, but is annexed to a man's person (c). 122.

Common in  
gross.

There may be a common in gross for animals levant and couchant ; for there may be a grant in gross of common for so many cattle as a certain farm, not in the possession of the grantee, could sustain by its products, with the assistance of the common (d). 123.

In many cases the right to common of pasture is confined to a particular part of the year only, as from Michaelmas to Lady-day ; in which case it is called a stinted common (e). 124.

Common for  
part of a  
year.

II. Common of estovers is a right of taking necessary housebote, ploughbote, and hedgebote in another person's woods or hedges, without waiting for any assignment thereof (f). Housebote is a sufficient allowance of wood to repair or burn in the house, though wood for fuel is sometimes also called firebote ; ploughbote and cartbote are wood to be employed in making and repairing instruments of husbandry ; and, haybote or hedgebote is wood for repairing hays, hedges, or fences (g). Common of

Common of  
estovers.

(a) 3 Cruise T. 23, § 17 ; Co. Litt. 122 a ; *Commissioners of Sewers v. Glassey*, L. R. 19 Eq. 134.

(b) 3 Cruise T. 23, § 18.

(c) 3 Cruise T. 23, § 19 ; 2 Bl. Com. 34 ; Co. Litt. 122 a, and n. 5.

(d) *Johnson v. Barnes*, L. R. 7 C. P. 592.

(e) 3 Cruise T. 23, § 21.

(f) Id. § 24 ; 2 Bl. Com. 35.

(g) 2 Bl. Com. 35.

PART I. T. 2.  
CH. 2, s. 5.

estovers may be appendant and appurtenant to a messuage or dwelling-house by prescription or grant, to be exercised even in lands not occupied by the tenant of the house (a). Common of estovers is so entire that it cannot be apportioned or divided (b). 125.

Common of  
turbary.

III. Common of turbary is a right of a person to dig turf on the lord's waste or on some other person's land. This kind of common can only be appendant to a house, not to land; for the turf is to be burned in the house. Nor can it extend to a right to dig turf for sale. Where common of turbary is appendant to a house, it will pass by a grant of such house with the appurtenances (c). 126.

Common of  
piscary.

IV. Common of piscary is a right to fish in the private waters of another person, or in a river running through another's land (d). This species of common cannot be apportioned (e). 127.

Other com-  
mons.

V. There is also a common of foldage, or liberty of folding sheep on another's ground, and a common of digging for coals, minerals, stones, and the like (f). 128.

VI. A right of pannage is simply a right vested by express or implied grant in an owner of pigs, or an owner of land, who keep pigs, to go into the wood of the grantor, and allow the pigs to eat the acorns or beech-mast which have fallen to the ground; and does not prevent the owner of the wood from lopping the trees in the ordinary course of management, or from cutting them down for timber, when ripe (g). 128a.

Copy-  
holders.

Copyholders are not entitled by general custom to common on the wastes of the manor of which their estates are

(a) 3 Cruise T. 23, § 24, 25.

(e) 3 Cruise T. 23, § 46.

(b) 3 Cruise T. 23, § 46.

(f) Co. Litt. 6 a, n. 1; 2 Bl. Com.

(c) 3 Cruise T. 23, § 31, 34; 2

34.

Bl. Com. 34.

(g) *Chilton v. Corporation of*

(d) 3 Cruise T. 23, § 35; 2 Bl.

*London*, L. R. 7 Ch. D. 562.

Com. 34.

held; but copyholders in fee or for life may by particular custom have common on the demesnes of the manor (a). **129.**

PART I. T. 2,  
CH. 2, S. 5.

The lord of the manor in which there is a right of common has the freehold and inheritance in him, and may exercise every act of ownership not destructive of the commoners' rights. And so may any other owner of the soil in which there is a right of common (b). **130.**

Freehold is  
in the lord.  
Rights of  
the lord or  
owner.

By the common law, the lord of a manor or the person who is seised in fee of the waste land, could not appropriate to himself, by inclosure or otherwise, any part of the wastes in which there was a right of common, because the common issued out of the whole and every part thereof (c). But by the Statute of Merton and other subsequent statutes, and the construction put upon them, he may inclose as much of the waste as he pleases for tillage and wood ground, provided he leaves common sufficient for such as are entitled thereto. This enclosure, when justifiable, is called "approving," an ancient expression signifying the same as "improving" (d). **131.**

Inclosure.

Wastes have also been and still may be inclosed by agreement between the lord and all the commoners, or by private Acts of Parliament, or under Acts relating to particular localities, or under the General Inclosure Acts (e). **132.**

(a) 3 Cruise T. 23, § 36.

(b) 3 Cruise T. 23, § 2, 47.

(c) 3 Cruise T. 23, § 59, 73.

(d) 2 Bl. Com. 34; 3 Cruise T. 23, § 59—66, 73, 78.

(e) See 29 Geo. 2, c. 36, as to inclosure for the purpose of planting, amended by the statute 31 Geo. 2, c. 41; 41 Geo. 3, c. 109, consolidating in one Act certain provisions usually inserted in inclosure Acts; 3 & 4 Will. 4, c. 87, for remedying defects in titles under awards then already made, notwithstanding want of due enrolment; 6 & 7 Will.

4, c. 115, for facilitating inclosure; 3 & 4 Vict. c. 31, for extending the powers and provisions of former Acts, 8 & 9 Vict. c. 118, intituled "An Act to facilitate the inclosure and improvement of commons and lands held in common, the exchange of lands, and the division of intermixed lands; to provide remedies for defective or incomplete executions, and for the non-execution of the powers of general and local inclosure Acts; and to provide for the revival of such powers in certain cases," which was amended by 9 &

PART I. T. 2,  
CH. 2, s. 5.

Application  
of compensa-  
tion money  
for common  
lands.  
Stat. 45 Vict.  
c. 15. The  
Common-  
able Rights  
Compensa-  
tion Act.

[It is provided by stat. 45 Vict. c. 15, s. 2 (Appendix), that money paid as compensation for commonable rights, or common land, shall be applied in one or more of the following ways: (a) the improvement of the remaining portion of the common land; (b) defraying the expense of proceedings under the Metropolitan Commons Acts or under the Inclosure Acts, 1845 to 1878, with reference to the management or regulation of such common land or of any application to Parliament with respect to the preservation and management thereof; (c) defraying the expense of any legal proceedings for the protection of such common land or the commoners' rights over the same; (d) the purchase of additional land to be used as common land; or (e) the purchase of land to be used as a recreation ground for the neighbourhood; the additional land purchased for use as common land to be conveyed to trustees, and the land purchased for use as a recreation ground to be conveyed to the local authority for the district, as specified in the Act.]  
**132a.**

Apportion-  
ment of  
right of  
common.

On the alienation of any part of land which enjoys the benefit of common appendant or appurtenant, the right of common is preserved and apportioned (a). And if a person having a right of common appurtenant to his land leases part of it, the lessee shall have common for beasts levant and couchant on the land (b). **133.**

Extinction  
or suspen-  
sion of right  
of common.

1. By re-  
lease to the  
owner of  
the land.

A right to common may be extinguished or suspended in various ways. Thus,—

1. As a right to common is entire throughout the whole of the land subject to it, if the commoner releases part of

10 Vict. c. 70, and extended by 10 & 11 Vict. c. 119, and 11 & 12 Vict. c. 99; 12 & 13 Vict. c. 83, for further facilitating inclosure and improvement of lands; and 15 & 16 Vict. c. 79, 17 & 18 Vict. c. 97, 20 & 21 Vict. c. 31, 22 & 23 Vict. c. 43,

and 39 & 40 Vict. c. 56, for amend-  
ing and further extending the  
former Acts.

(a) Burton, § 1141; Co Litt.  
122 a.

(b) 3 Cruise T. 23, § 45; Co.  
Litt. 122 a.

the land from his right of common, it will operate as an extinguishment of the right in every other part (a). 134.

PART I. T. 2,  
CH. 2, s. 5.

2. Common appendant and appurtenant become extinguished by unity of possession of the land to which the right of common was annexed with the land in which the common existed. To constitute such an unity of possession as will extinguish a right of common, the person must have an estate in the lands to which the common is annexed, and in those where the right of common exists, equal in duration and all other circumstances of right (b). Where a person having common appurtenant purchases part of the lands wherein the common is to be had, the whole right of common becomes extinct; because it is against common right. And where a person having common appurtenant takes a lease of part of the land in which he has such right of common, all his common will be suspended during the continuance of the lease (c). But if one of the tenants of a manor purchases any part of the land over which he has a right of common appendant, his right over the rest will continue; because it is of common right (d). 135.

2. By unity  
of posses-  
sion.

A right of common which has been extinguished by unity of possession may be revived by a new grant (e). 136.

3. Common appendant or appurtenant for cattle levant and couchant may also be extinguished by severance. Thus, where a person, having common of this kind annexed to a messuage or tenement, conveys away the messuage or tenement, excepting the common, this will cause an extinguishment of the common (f). 137.

3. By  
severance.

4. By a common law enfranchisement of a copyhold to

4. By  
enfranchise-  
ment.

(a) 3 Cruise T. 23, § 82; Burton, ton, § 1142; Co Litt. 122 a.  
§ 1142.

(b) 3 Cruise T. 23, § 83, 86; 23, § 42; Co. Litt. 122 a.

*Warburton v. Parke*, 2 Hurl. & (e) 3 Cruise T. 23, § 95.

Norm. 64.

(f) 3 Cruise T. 23, § 91.

(c) 3 Cruise T. 23, § 43 90; Bur-

PART I. T. 2,  
CH. 2, s. 5. which a right of common is annexed, such right is extinguished at law, although not in equity (*a*). But rights of common are saved in enfranchisements under the statute 4 & 5 Vict. c. 35 (*b*), and 15 & 16 Vict. c. 51 (*c*). **138.**

[By virtue of stat. 44 & 45 Vict. c. 41, s. 6 (Appendix), a conveyance, made after the 31st day of December, 1881, of land, or of a manor, is deemed to include and operates to convey so far as a contrary intention is not expressed therein, all commons appertaining, or reputed to appertain, or at the time of the conveyance enjoyed with, or reputed or known as part or parcel of or appurtenant to the property conveyed.] **138a.**

## SECTION VI.

### *Of a Franchise or Liberty.*

PART I. T. 2,  
CH. 2, s. 6. A franchise or liberty is a Royal privilege or branch of the Royal prerogative subsisting in the hands of a subject. What are franchises, and how they arise. Being derived from the Crown, franchises must arise from a Royal grant, or, in some cases, they may be held by prescription which presupposes a grant. Some of the most important franchises are forests, chases, parks, and free warren (*d*). **139.**

Forest. A forest comprehends within it a chase and free warren (*e*). Part of the land and wood comprised in a forest may belong to private persons; but they can only occupy and enjoy it in such manner as is consistent with the rights of the proprietor of the franchise of the forest, and the preservation of the game (*f*). **140.**

(*a*) 3 Cruise T. 23, § 81; 1 T. 3, Ch. 3.  
Scriven, 4th ed. by Stalman, 556;  
Cooke on Enfranch. 108.

(*b*) See s. 81, *infra*, Part II. T. 3.  
Ch. 3.

(*c*) See s. 45, *infra*, Part II.

(*d*) 2 Bl. Com. 37—40; 3 Cruise T. 27.

(*e*) 3 Cruise T. 27, § 7; Co. Litt. 233 a.

(*f*) 3 Cruise T. 27, § 9.

A chase is a franchise or liberty of keeping certain animals within a known district, with an exclusive right of hunting them therein. It is in most respects similar to a forest; indeed the only difference between them is, that a chase has no laws peculiar to it. Beasts of chase are buck, doe, fox, marten, and roe, in which the owner of the chase has a property (a). 141.

PART I. T. 2,  
CH. 2, s. 6.  
Chases.

A park is an inclosed chase, extending over a person's own grounds, privileged for beasts of venery, and beasts of forest and chase, by a Royal grant or prescription (b). 142.

Parks

A free warren is an exclusive right to have, hunt, and take certain wild beasts and fowls, called game, within the precincts of a manor or other known place. The beasts of warren are hares and rabbits; the fowls of warren are pheasants and partridges (c). 143.

Free  
warrens.

There are various other kinds of franchises, such as several fisheries, and the right to hold a fair or market, to receive tolls, to have waifs, wrecks, estrays, and treasure trove, etc., as to which the reader is referred to other works (d). 144.

Other fran-  
chises.

[By virtue of stat. 44 & 45 Vict. c. 41, s. 6 (Appendix), a conveyance made after the 31st day of December, 1881, of a manor, is deemed to include and operates to convey so far as a contrary intention is not expressed therein, together with the manor, all franchises appertaining or reputed to appertain to it, or at the time of the conveyance enjoyed with or reputed or known as parcel thereof.] 144a.

(a) 3 Cruise T. 27, § 10.

(c) 3 Cruise T. 27, § 19, 23.

(b) 3 Cruise T. 27, § 15; Co. Litt.  
233 a.

(d) See 3 Cruise T. 27; Co. Litt.  
122a n. 7; 2 Bl. Com. 37, 39, 40, etc.

## SECTION VII

*Of Ways.*

PART I. T. 2.  
CH. 2, s. 7.

Ways.

Different  
kinds of  
ways.

How they  
arise.

Ways by  
necessity.

A right of way is a private right of going over another man's ground (a). It may be a way to be used alone, or in company, on foot, or on horseback, with carriages or cattle (b). The title to it may be by express grant, or by prescription, or by necessary implication. Thus with respect to necessary implication, a person may claim a right of way over another's land from necessity: so that if a piece of land comprised in a conveyance is surrounded by land belonging to the grantor, a right of way over the grantor's land passes of necessity to the grantee; for otherwise he could not derive any benefit from his acquisition; and the grantor may assign the way where he can best spare it. It is the same though the close aliened be not totally inclosed by the land of the grantor, but partly by the land of a stranger; for the grantee cannot go over the stranger's land. And so if a man has four closes lying together, and sells three of them, reserving the middle close, and has no way thereto but through one of those which he sold, although he did not reserve any right of way, yet he shall have it, as reserved to him by law, to enable him to enjoy the reserved close in the condition in which it happened to be at the time of the sale (c). And the lessee of an inner close has by necessity a right of way, suitable to the business or purpose for which the lease was made, over an outer close which belongs to the same landlord. But the lessee of one close cannot, as such,

(a) 2 Bl. Com. 36; 3 Cruise T. 24, § 1.

(b) Burton, § 1166; Co. Litt. 56a.

(c) 3 Cruise T. 24, § 10, 12; 2

Bl. Com. 36; Burton, § 1167; *Davies v. Sear*, L. R. 7 Eq. 427:

*Corporation of London v. Riggs*, L. R. 13 Ch. D. 798.



acquire, by user, an easement over another close which belongs to the same landlord; for the possession of the tenant of the demised close is the possession of the landlord (a). 145.

Where there is no such necessity, a permanent right of way cannot, it seems, be created otherwise than by deed. And it has been held, that a bargain and sale is not a proper instrument for this purpose (b). 146.

[With respect to deeds executed after the 31st day of December, 1881, it is provided by stat. 44 & 45 Vict. c. 41, s. 62 (Appendix), that "a conveyance of freehold land to the use that any person may have for an estate or interest not exceeding in duration the estate conveyed in the land, any easement, right, liberty, or privilege in, over, or with respect to that land, or any part thereof, shall operate to vest in possession in that person that easement, right, liberty, or privilege, for the estate or interest expressed to be limited to him; and he and the persons deriving title under him, shall have, use, and enjoy the same accordingly." ] 147.

Where a person has a right of way over another's close, and he purchases the close, his right of way is extinguished by the unity of seisin and possession, if it be only an easement; but if it is of necessity, it is not extinguished by unity of possession (c). 148.

A right of way, being an incorporeal hereditament, cannot be divested (d). 149.

As to general words passing a right of way, see *Barkshire v. Grubb*, L. R. 18 Ch. D. 616, and cases there cited,

(a) *Gayford v. Moffatt*, L. R. 4 Ch. Ap. 133.

(b) *Burton*, § 1167.

(c) 3 Cruise T. 24, § 23.

(d) 3 Cruise T. 24, § 21. As to some other kinds of incorporeal

hereditaments, such as offices, dignities, rights to running water, and light, and rights to pews, the reader is referred to 2 Bl. Com. 36, 37; 3 Cruise T. 25, 26; and other works.

PART 1, T. 2.  
CH. 2, s. 7. and *Bolton v. Bolton*, L. R. 11 Ch. D. 968. [And with reference to conveyances made after the 31st day of December, 1881, including and operating to convey ways, see stat. 44 & 45 Vict. c. 41, s. 6 (Appendix).] 149a.

## PART II.

### Of the several kinds of Interests constituting the Subject of Conveyancing.

#### TITLE I.

OF CONDITIONS AND LIMITATIONS ON WHICH INTERESTS  
DEPEND, OR BY WHICH THEY MAY BE AFFECTED (a).

“THE mixture of those things by speech which by nature are divided, is the mother of all error. To take away therefore that error which confusion breedeth, distinction is requisite” (b). “A confusion of terms in any science tends to confound the science itself, by destroying that precision of ideas, that distinction among its objects, which is the very groundwork of all knowledge. ‘Nomina si perdas, certe distinctio rerum perditur’” (c). 150.

PART II  
TITLE I

Preliminary  
remarks on  
the distinctions  
between con-  
ditions and  
limitations.

The subject of the distinctions between conditions and limitations is highly scientific, and although it savours strongly of grammatical or verbal criticism, yet there are many instances in which, if required to construe a will containing these forms of expression, a practitioner not well skilled in the subject would be in the most imminent

(a) This is as proper a place as any other for the subject of conditions and limitations, and is practically the most convenient.

(b) Hooker's Law of Eccles. Polity, B. III. c. 3, s. 1.

(c) 1 Fearn, Coll. Jur. 238.

PART II.  
TITLE I.

peril of forming a totally wrong opinion upon the effect of the instrument. And there are numberless cases in which, if a person were to set about, as a draftsman, to give effect to the intentions of a testator, without an accurate knowledge of this subject, he would be almost sure unconsciously to be sowing the seeds of doubt, litigation, and loss. It is impossible too strongly to impress upon the student and the unlearned practitioner the fact, that, in using words of condition, limitation, restriction, or contingency, the change of the smallest word, however unimportant it may at first sight appear, may, and often does, make the greatest possible difference; he is on the edge of distinctions so refined and shadowy as to be likely to escape his observation, and yet sufficiently settled and substantial in law to prove a source of complete loss of property to the objects of the testator's regard; he is treading upon most perilous ground; he is traversing a land of legal traps, snares, and pitfalls (a). 151.

(a) For some illustrations of the importance of and accurate knowledge of the distinctions on this subject, the reader is referred to the great Bridgwater case, *Egerton v.*

*Earl Brownlow*, 4 H. L. Cas. 1; to the case of *The Earl of Scarborough v. Doe* d. *Savile*, 3 Ad. & El. 897; and to Chap. V. of this Title.

## CHAPTER I.

## OF THE SEVERAL KINDS OF CONDITIONS.

A CONDITION is a clause expressed or implied, providing or constructively importing that an estate shall be created, enlarged, diminished, or defeated, or the beneficial interest therein shall be suspended, in a given event (*a*). **152.**

PART II.  
T. 1, CH. 1.  
—  
Definition  
of a condi-  
tion.

Conditions, therefore, are either express, that is, expressed in words, which are sometimes termed conditions in deed; or implied, that is, only annexed by construction of law, which are sometimes termed conditions in law (*b*). **153.**

Conditions,  
express and  
implied.

Some conditions are termed subsequent. A condition subsequent, properly so called, is a condition upon which an estate or interest is to be prematurely defeated or determined, and no other estate is to be created in its room. Regularly such a condition is annexed to an estate, or interest created by a previous clause or instrument (*c*). The words "on condition," "provided," "so that," or, in the case of a lease for years, words of similar import, sufficiently denote a condition subsequent, and cause a cesser, without any words expressive of the intention of cesser in the event specified (*d*). **154.**

Conditions  
subsequent.

There are other conditions which are called precedent, which are conditions upon which an estate or interest is to

Conditions  
precedent.

(*a*) Smith's Executory Interests annexed to Fearn, § 9.

Fearn, § 12; *Egerton v. Earl Brownlow*, 4 H. L. Cas, 182.

(*b*) Co. Litt. 201 a; 232 b; Pres. Shep. T. 117, 118.

(*d*) See Litt. s. 328—331; Co. Litt. 204 a; and Smith's Executory Interests annexed to Fearn,

(*c*) Co. Litt. 237 a, n. 1; Smith's Executory Interests annexed to

§ 15—19.

PART II.  
T. 1, CH. 1.

arise or be created. Regularly a condition precedent is not annexed to an estate or interest created by a previous clause or instrument (a), but it is usually and more properly the introductory part of the clause whereby an estate is created (b). 155.

No technical  
terms neces-  
sary.

There are, however, no precise technical terms required to make a condition precedent or subsequent, even in a deed, and much less in a will (c). 156.

Mixed con-  
ditions.

There are some conditions which are of the nature of conditions subsequent in regard to one estate, and of the nature of conditions precedent in regard to another estate. These may be termed mixed conditions. They are of two kinds: one kind of mixed condition is a destructive and creative condition, that is, a condition upon which an estate or interest is to be defeated, and another estate or interest is to arise in its room. And of destructive and creative conditions, one is called a conditional limitation. The other mixed condition is a destructive and accelerative condition, that is, a condition upon which an estate or interest is to be defeated, and another estate or interest in remainder is to be accelerated and take effect as if the former estate had expired according to the terms of its original limitation. This may be termed a condition of cesser and acceleration (d). 157.

Examples.

It may be useful to illustrate what has been said by examples; for, as Lord Coke remarks, "Examples do teach." Now, 1st. If A. devises that if B. do pay 100*l.*, B.

(a) Smith's Executory Interests annexed to Fearn, § 13.

(b) *Egerton v. Earl Brownlow*, 4 H. L. Cas. 183; *Cooke v. Turner*, 14 Sim. 503.

(c) 6 Cruise T. 38, c. 16, § 3.

(d) See Smith's Executory Interests annexed to Fearn, § 14, 20—22; Lord *Truro's* remarks in *Egerton v. Earl Brownlow*, 4 H. L. Cas. 1, 182—194; *Clavering v. Ellison*, 3

*Drewry*, 451, 469; 8 D. M. & G. 662; 7 H. L. Cas. 707; *Micklethwait v. Micklethwait*, 4 Com. B. 790; *Lamburde v. Peach*, 4 Drew. 553; 8 W. R. 355. (L. J.) *Turton v. Lamburde*, 1 D. F. & J. 495; *Gardiner v. Jellicoe*, 12 C. B. (N. S.) 568; 11 Ho. of Lords Cas. 323. See also *infra*, par. 158, 169—171, as to conditional limitations.

shall have an estate in fee, this is a condition precedent. PART II.  
T. 1, CH. I.  
 2ndly. If A. devises to B. an estate in fee, "provided," or "so that," or "on condition," that B. pay 100*l.*, this is a condition subsequent of the concise or implied form. 3rdly. If A. devises to B. an estate in fee, but provides that if B. do not pay 100*l.*, his estate shall cease, this is a condition subsequent of the unconcise or explicit form; for, instead of contenting himself with the use of the technical words "provided," "so that," or "on condition," which of their own nature and efficacy imply or import a condition for determining the estate on non-payment of the money, the testator provides for the ceasing of the estate in words actually expressive, and not merely technically indicative of his meaning. 4thly. If A. devises an estate in fee to B., but directs that if B. do not pay 100*l.*, then his estate shall cease, and the property shall go over to C., this is a mixed condition of the destructive and creative kind; it is a mixed condition of the species which is denominated a conditional limitation; for it is destructive as regards the estate of B., and creative as regards the estate of C. 5thly. If A. devises an estate tail to B., remainder to C. in tail, and directs that in case B. do not pay 100*l.* his estate shall cease, and the property shall immediately go over to C., as if B. were dead without issue, this is a mixed condition of the destructive and accelerative kind, or a condition of cesser and acceleration. 158.

As a general rule, the practical distinction between a condition precedent and a condition subsequent is this:—  
 In the case of a condition precedent, no estate or interest vests until the performance of the condition; whereas in the case of a condition subsequent, the estate or interest is ordinarily vested, in possession, or at least in right, by the gift, and the operation of the condition subsequent is to divest it and cause it to cease, in a specified event. 159.

Practical  
distinction  
between  
conditions  
precedent  
and subse-  
quent.

PART II.  
T. I, CH. I.

Condition  
subsequent  
may defeat  
a contingent  
use or in-  
terest.

But it is not necessary or an invariable rule, that a condition, to be a condition subsequent, should be a condition to defeat a use or estate *subsequently to its having become actually vested*, that is, vested in interest at least. It may be a condition subsequent, even when annexed to a contingent gift or interest; for a contingent gift or interest has a real existence, capable, as much as a vested interest or estate, of being made to cease and become void by the operation of a condition subsequent. The fact of the estate or interest being vested or being contingent is perfectly immaterial as regards its capacity of being the subject of the operation of a condition subsequent. In the one case a contingent gift or interest exists; in the other case an actual estate exists. The two things are very different; but each exists, and each may properly be made to cease and become void by virtue of a condition subsequent annexed to it (a). 160.

Derivation  
of the term  
condition  
subsequent.

“One reason, indeed, why a condition subsequent was so called, is, that it is a condition that *ordinarily* defeats a use or estate subsequently to its vesting.” “But there is another reason why a condition subsequent may have received that name. A condition may be called precedent when it precedes, and because it precedes, the words of gift; and a condition may be called subsequent when it follows, and because it follows, the words of gift, whether that gift is vested at the time when the condition, which follows it, is to operate or not. Regularly, a condition precedent does in form precede, and a condition subsequent does in form follow the words of gift; and in all cases a condition precedent does, in substance, and by construction at least, precede the gift, and a condition subsequent does, in substance and by construction at least, follow the gift; for, if the gift is to arise upon a condition, such condition

(a) It was upon this that the decision in the great case of *Egerton v. Earl Brownlow*, 4 H. L. Cas. 1, turned.



must in substance precede the gift ; and if the gift is to be defeated, or the use or estate is to cease or determine by the condition, such condition must in substance follow the gift ; the gift in the latter case must have an existence antecedent to the operation of the condition which is to defeat it, or cause it to cease or determine" (a). 161.

PART II.  
T. I, CH. I.

(a) Lord *Truro*, in *Egerton v. Earl Brownlow*, 4 H. L. Cas. 1,187—8.

## CHAPTER II.

OF 'SPECIAL OR COLLATERAL LIMITATIONS AND CONDITIONAL'  
LIMITATIONS.PART II.  
T. I, CH. 2.Different  
senses of  
the word  
limitation.

THE word limitation is used in two different senses : in its original sense of a limit or bound, it is a restrictive expression, which serves to mark out the limits or bounds of an estate. In its derivative sense, a limitation signifies an entire sentence creating and actually or constructively marking out the quantity of an estate (*a*). In other words, in the original sense the term limitation denotes the limits or bounds to an estate; and in the derivative sense, it denotes a clause creating an interest with such limits or bounds. **162.**

Different  
kinds of  
limitations  
in the sense  
of limits or  
bounds.  
General  
limitations.

Limitations, in the original sense of limits or bounds, are either general or special. **163.**

"A general limitation is a restrictive expression, which determines the general class or denomination, in point of quantity of interest, to which an estate belongs, by confining it to the period during which there shall be a succession of heirs general or special, or of persons filling a certain corporate capacity, or to the period of a life or lives, or of a certain number of years. It is necessary to the very existence of law, that estates should be distributed into certain classes, known by certain denominations, and that every estate should be referable to one or other of these classes. And hence a general limitation, which serves to determine the general class and denomination to which an

(*a*) Smith's Executory Interests annexed to Fearn, § 24, 26.

estate belongs, is ordinarily incident to every estate. The general limitation, however, may either be expressed by the words of the instrument creating the estate, or may be implied by construction of law. Thus, where land is granted to A. and his heirs, the words 'and his heirs' constitute a general limitation : they serve to mark out the limits of the estate ; to ascertain the quantity of interest ; and thus to determine to what general class and denomination the estate belongs ; denoting that the estate is an estate in fee simple. And similarly the words 'and the heirs of his body,' 'for life,' 'for years,' are general limitations, denoting that the estates are respectively estates tail, freeholds not of inheritance, and chattel interests" (a). 164.

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"A special limitation is a qualification serving to mark out the bounds of an estate, so as to determine it ipso facto, in a given event, without action, entry, or claim, before it would or might otherwise expire by force of or according to the general limitation. This is sometimes denoted by the expression 'a determinable quality.' Thus, where land is granted to A. till, etc., or so long, etc., or if, etc., or whilst, etc., or during, etc., the estates so limited have two limitations : for, the law gives a life estate to A., implying the words 'for life,' so as to constitute an implied general limitation, while the words 'till,' etc., form an additional and special limitation. And where land is limited to A. for ninety-nine years if he shall so long live, the words 'for ninety-nine years' form the general limitation, denoting that the interest is a chattel interest for ninety-nine years ; and the words 'if he shall so long live,' constitute a special limitation, which would determine his estate on his death. This estate, therefore, is of precisely the same eventual duration as an estate limited to A. for life, in consequence of the addition of the special limitation. But

Special  
limitation.

(a) Smith's Executory Interests annexed to Fearn, § 28—31.

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T. 1, CH. 2.

the difference in the general limitation in the two cases creates the important distinction between them, that the one is but a chattel interest, whereas the other is a freehold" (a). 165.

Special limitations, like implied conditions, are sometimes called conditions in law (b). 166.

Direct special limitations.

Special limitations are regularly either direct or indirect.

Indirect special limitations.

"A direct limitation is a restriction couched in words which directly express a limit to the quantity of the interest created; as, to A. during, etc., or till, etc., or whilst, etc., or so long, etc. (c). An indirect limitation is a restriction put in a conditional form, or in words which only imply a limit to the quantity of interest created (as, where land is given to A. for 99 years, if A. shall so long live, or if A. continue, etc.), or by words of description which attach a certain character or qualification to the objects of the grant or devise, so as to qualify the generality thereof, and indirectly to limit the duration of the estate to such a time as they shall continue to sustain that character; as, where land is granted to A. and his heirs, lords of the Manor of Dale. And where an estate is limited to the use of B. and his heirs, he and they taking, etc., and continuing to take, etc., the name and arms of A.; this is an indirect limitation, so that the estate can endure no longer than B. and his heirs comply with the condition" (d). 167.

Conditional limitations.

The term conditional limitation is sometimes used generically to denote any kind of qualified limitation, in the derivative sense of a sentence limiting an interest; any kind of limitation, in the derivative sense, which depends upon a condition, in contradistinction to an abso-

(a) Smith's Executory Interests annexed to Fearn, § 34, 35.

(b) Co. Litt. 234 b, 236 b; 1 Shep. T. 121. For other points on the subject of limitations, see Smith's

Executory Interests annexed to Fearn, pp. 10—15.

(c) Smith's Executory Interests annexed to Fearn, § 41.

(d) Id. § 42; Litt. s. 597 (2). II. 3

lute limitation ; or to denote an indirect special limitation, <sup>PART II.</sup> in contradistinction to a direct special limitation. This use of the term, though philologically correct enough, is practically productive of a great and mischievous confusion of ideas. 168. <sup>T. 1, CH. 2.</sup>

A conditional limitation, in the specific sense, is a proviso, by way of use or devise, for the annihilation of an interest under a preceding limitation, in a particular event which is unconnected with the original quantity of that interest, and which may not happen till after such interest has become vested, and for the creation of a new interest in its stead, in favour of another person (*a*) : as where an estate is devised to A. for life, or to A. indefinitely, provided that when C. returns from Rome, it shall then immediately go to B. and his heirs ; or, where land is granted, to A. and his heirs, to the use of B. and his heirs ; but in case, etc., then immediately to the use of C. and his heirs. 169.

These limitations can only be by way of use or devise. They would be void if inserted in a deed at common law, being foreign to the simplicity of the conveyances employed before uses and devises were introduced. When these limitations are by way of use, they are sometimes called shifting uses, and sometimes springing uses. Those which are by devise are usually designated by the generic name of executory devises, although that term also comprises other kinds of limitations. These conditional limitations partake of the destructive nature of conditions subsequent, and the creative nature of limitations in the derivative sense. And hence they are appropriately termed conditional limitations (*b*). 170.

By creating a new estate, conditional limitations differ

(*a*) See Fearn. 10, n. (*h*), and 14 —16 ; and cases stated, Fearn. 275, 396, 399 ; and Smith's Executory Interests annexed to Fearn. § 149. (*b*) Id. § 149—151.

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from conditions subsequent ; from clauses of cesser and acceleration ; and from special or collateral limitations in the original sense of limits. By constituting a distinct clause or proviso for the cesser of a prior interest in an event unconnected with the original measure of that interest, they differ from special or collateral limitations in another respect (a). 171.

(a) See Smith's Executory Interests annexed to Fearne, § 153—4.

## CHAPTER III.

## OF THE PERFORMANCE OF CONDITIONS.

WHERE a time is appointed for the performance of a condition, and the person who shall perform it dies in the meantime, the right to perform it will pass to his heir or personal representatives, according to the nature of the case, if at least it is immaterial to the person to whom it was to be performed, whether it is performed by the deceased or by his representatives (*a*). And where the word month is mentioned generally in a condition, it signifies, a calendar month. Where no particular time is appointed, the person to whom the condition is reserved must in some cases perform it within a reasonable and convenient time, and in other cases he may perform it any time during his life ; but if he dies without performing it, the right is not transmitted to his representatives (*b*). 172.

Where a particular place is appointed for the performance of a condition, the person who is to perform it must come to that place (*c*). And if the condition of a bond or a feoffment is to pay money at a certain place at any time during the life of the person who is to pay it, he must give notice to the person who is to receive it, to attend to receive it : for otherwise he would have to be in perpetual attendance (*d*). 173.

(*a*) 2 Cruise T. 13, c. 2, § 7 ; Litt. s. 334 ; 5 Vin. Ab. 2nd ed. 113—115.

(*b*) 2 Cruise T. 13, c. 2, § 9, 10 ; Litt. s. 337 ; 5 Vin. Ab. 2nd ed.

193—5 ; 2 Pres. Shep. T. 377—8 ; Co. Litt. 208 a, b, 209 a, 219 a, b.

(*c*) 2 Cruise T. 13, c. 2, § 12.

(*d*) Co. Litt. 211 a.

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T. 1, CH.

Where a  
time is  
fixed

Month.

Where no  
time is  
fixed.

Where a  
place is ap-  
pointed.

What is  
the effect of

Where the  
condition is  
not broken.

If no particular place is appointed, and the condition is that a person shall pay a gross sum of money, and not a rent, in that case he must seek for the person to whom the money is to be paid, if he is within the realm; but if he is out of the realm, then it is not necessary to seek him, and the condition is not broken (*a*). If no place is appointed for payment of a rent, it is sufficient to tender it on the land *b*. 174.

Proviso as  
to receiving  
testator's  
surname.

Under a proviso requiring a devisee to assume the testator's surname, the inserting the testator's surname before his, the devisee's, own, is not a compliance; but adding the testator's surname after his own is a compliance (*c*). 175.

How much  
of the prece-  
dent must  
be per-  
formed.

In the construction of personal bequests, where the condition is precedent, and there is no limitation over on its non-fulfilment, it is sufficient if it is performed in substance, when, from unavoidable circumstances, the whole cannot be literally fulfilled (*d*). But where there is a limitation over of the legacy on non-fulfilment of the condition, a strict and literal performance is required (*e*). Thus, where a bequest is made upon the precedent condition of the legatee paying a sum of money, or executing a release of all demands within a certain time, and there is no limitation over upon non-compliance, if he pay the money or execute the release, although not within the time, he will be entitled to the legacy. But if the legacy is limited over in the event of the non-payment or the non-execution of the release within the time, the bequest over will take place in that event (*f*). 176.

How condi-  
tions sub-  
sequent or

Conditions subsequent and mixed are odious, and to be construed with great strictness; so that they must be

(a) 2 Cruise T. 13, c. 2, § 13;  
Litt. s. 340.

(b) Co. Litt. 210 b, 211 b.

(c) *D'Eyncourt v. Gregory*, L. R.  
1 Ch. D. 441.

(d) 1 Rep. Leg. by White, 801,  
769.

(e) 1 Rep. Leg. by White, 769.

(f) 1 Rep. Leg. by White, 837  
—8.



strictly performed to be of any avail (a); for it is only reasonable, that, before a person is deprived of the benefit intended for him, it should be quite certain that the event upon which the forfeiture was to arise has really happened. And this is especially the case where the estate or interest is vested, that is, actually clothed with the ownership, and the person in whom it is vested may have founded a family, or have made other important arrangements on the faith of it. And, in the case of a conditional limitation, or a condition of cesser and acceleration, there is also the consideration, that it is only reasonable to construe the conditional language in favour of the prior rather than of the secondary object of the grant, devise, or bequest. And hence where a testator limited real and personal estate to his grandchildren, upon condition that they should be educated in England and in the Protestant religion; and if any of them should be educated abroad or not in the Protestant religion, he gave the share of such grandchild to the others; it was held that the condition was too uncertain to enable the Court to say what was meant by "educated in England" or "educated abroad," so that the share of a grandchild who was educated partly in England and partly abroad, was held not to be defeated (b). 177.

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mixed must  
be per-  
formed.

If in the event of the marriage of a legatee without the consent of a trustee or trustees, the legacy is to go over from such legatee to another person, and such trustee or trustees die before the marriage, without having consented, the interest of the prior legatee becomes absolute (c). So

Conditions  
of consent  
to marriage.

(a) 1 Rep. Leg. by White, 783; Co. Litt. 218 a, 219 b; 1 Pres. Shep. T. 133; *Clavering v. Ellison*, 3 Drewry, 451, 470; 8 D. M. & G. 662; 7 H. L. Cas. 707. See *Dunne v. Dunne*, 3 Sm. & G. 22, 27; 7 D. M. & G. 207; *Curzon v. Curzon*, 1 Gif. 248; *Walmesley v. Gerard*, 29

Beav. 321, 342. As to cases where one thing may be accepted as a satisfaction for a different thing, see Co. Litt. 212 b.

(b) *Clavering v. Ellison*, 3 Drewry, 451; 8 D. M. & G. 662; 7 H. L. Cas. 707.

(c) 1 Rep. Leg. by White, 802.

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if a legatee's interest is to go over upon marriage without the consent of an executor, and he renounces or refuses to act, and the legatee marries without obtaining such consent, the interest of the prior legatee becomes absolute (a). 178.

It is sufficient if precedent conditions requiring marriages with consent are substantially complied with, when they cannot be executed according to the letter. Hence, if a precedent condition requires the consent of three trustees to the marriage of the legatee, and one of them dies, the approbation of the survivors previously to the marriage will be a sufficient compliance with the condition (b). And so the consent of a surviving parent will satisfy a condition requiring the consent of the parents (c). 179.

How consent must be given.

As a general rule, when the consent of executors or trustees, or the major number of them, is required to the marriage of a legatee, it must be obtained before or at the time of the marriage (d). Consent to marriage may be given conditionally, and the vesting or forfeiture of the legacy will depend upon the performance or non-performance of the condition (e). Consent should be given to the particular match which is made. Yet, if the legatee is of age, and a general consent is given to the legatee's marrying, and the legatee marries without the knowledge of the person whose consent is required, the marriage will be considered to have been solemnized within the true intent and meaning of the condition (f). A condition of consent to a marriage will be deemed to be complied with, if the party to consent acquiesces in addresses to the person married, or if the legatee marries with the approbation of the testator in his lifetime (g). And a Court of Equity will

(a) 1 Rep. Leg. by White, 804.

(b) 1 Rep. Leg. by White, 801—2.

(c) *Darson v. Oliver-Mossey*,  
L. R. 2 Ch. D. (Ap.) 753.

(d) 1 Rep. Leg. by White, 798.

(e) 1 Rep. Leg. by White, 812.

(f) 1 Rep. Leg. by White, 808.

(g) 1 Rep. Leg. by White, 815, 818.

limit the general terms of such a condition to an assent to one marriage only (a). 180.

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It is conceived that when a condition requiring the consent to a marriage is precedent, the consent must be obtained, whether the legacy is limited over or not (b). But, when there is no bequest over upon non-compliance with a condition subsequent requiring consent to marriage, the legacy is treated as an absolute legacy, the condition being regarded as a mere declaration in terrorem (c). 181.

Conditions of consent, when construed as in terrorem only.

Where gifts and legacies are bestowed on persons, on condition that they shall marry with the consent of parents, guardians, or other confidential persons, Courts of Equity will not suffer the manifest object of the condition to be defeated by the fraudulent, corrupt, or unconscientious refusal of the parties whose consent is required to the marriage (d). 182.

Refusal of consent to a marriage.

When the vesting of an interest in real or personal estate is made to depend upon the condition of one event happening (whether the condition is precedent or mixed), and a different event happens, the interest which is to arise (if it is not a mere alternative interest, which will take effect on failure of the prior limitation generally) fails altogether, however plain the apparent intention to the contrary may be, unless such intention is sufficiently expressed by, or necessarily implied in, other words in the instrument. And, if such interest was to arise by way of conditional limitation, in defeasance of a prior interest, such prior interest then becomes absolute and indefeasible (e). 183.

Effect of non-fulfilment of a condition, precedent or mixed.

A condition may be excused, 1. By the refusal, except in certain cases, of the person to whom it is to be performed,

Condition dispensed with.

(a) 1 *Rop. Leg.* by White, 820.

*Leg.* by White, 807.

(b) 1 *Rop. Leg.* by White, 827.

(c) *Smith's Executory Interests* annexed to *Fearne*, § 688—9

(e) *Ibid.*

(d) *Story's Eq. Jur.* 257; 1 *Rop.*

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when performance is tendered. 2. By his absence in those cases where his presence is necessary for the performance of it. 3. By his obstructing or preventing the performance of it. 4. By his neglecting to do the first act, if it is incumbent on him to do it (*a*). 5. By an act by which the grantor or testator who imposed the condition subsequently renders the performance of it impossible (*b*). 184.

By the old law a condition once dispensed with, in whole or in part, was dispensed with for ever, and as to all the property; for a condition could not be apportioned, except by act of law. Thus, if a lease were made for years, on condition that the lessee or his assigns should not alien without the licence of the lessor, and the lessor licensed the lessee alone to alien, or licensed him to alien a part of the land, or licensed him to alien all the land for a time; or if the lease was to three, on such a condition, and the lessor licensed one of them to alien; in all these cases, the condition was gone for ever (*c*). But the neglect of the lessor to avail himself of the forfeiture by entry, and his subsequent acceptance of rent, have not this effect, but amount simply to a confirmation of the first alienation (*d*). 185.

Restriction  
of effect of  
licence to  
alien.

By the stat. 22 & 23 Vict. c. 35, "Where any licence to do any act which without such licence would create a forfeiture, or give a right to re-enter, under a condition or power reserved in any lease heretofore granted or to be hereafter granted, shall at any time after the passing of this Act be given to any lessee or his assigns, every such licence shall, unless otherwise expressed, extend only to the permission actually given, or to any specific breach of

(*a*) Co. Litt. 207 a, n. 1; 209 a;  
2 Cruise T. 13, c. 2, § 25.

(*b*) *Walker v. Walker*, 2 D. F. &  
J. 255; *Yates v. University of Lon-*  
*don*, L. R. 8 Ch. Ap. 454; affirmed

on appeal, L. R. 7 H. L. 438.

(*c*) 1 Pres. Shep. T. 145, n. (61)  
159; Co. Litt. 202 b, n. 2; 2 Cruise  
T. 13, c. 1, § 38.

(*d*) Burton, § 853.

any proviso or covenant made or to be made, or to the actual assignment, under-lease, or other matter thereby specially authorised to be done, but not so as to prevent any proceeding for any subsequent breach (unless otherwise specified in such licence); and all rights under covenants and powers of forfeiture and re-entry in the lease contained shall remain in full force and virtue, and shall be available as against any subsequent breach of covenant or condition, assignment, under-lease, or other matter not specifically authorised or made punishable by such licence, in the same manner as if no such licence had been given; and the condition or right of re-entry shall be and remain in all respects as if such licence had not been given, except in respect of the particular matter authorised to be done" (s. 1). And "where in any lease heretofore granted or to be hereafter granted there is or shall be a power or condition of re-entry on assigning or underletting or doing any other specified act without licence, and a licence at any time after the passing of this Act shall be given to one of several lessees or co-owners to assign or underlet his share or interest, or to do any other act prohibited to be done without licence, or shall be given to any lessee or owner, or any one of several lessees or owners, to assign or underlet part only of the property, or to do any other such act as aforesaid in respect of part only of such property, such licence shall not operate to destroy or extinguish the right of re-entry in case of any breach of the covenant or condition by the co-lessee or co-lessees, or owner or owners, of the other shares or interests in the property, or by the lessee or owner of the rest of the property (as the case may be) over or in respect of such shares or interests or remaining property, but such right of re-entry shall remain in full force over or in respect of the shares or interests or property not the subject of such licence" (s. 2). And by the stat. 23 & 24 Vict. c. 38,

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Restricted  
operation of  
partial  
licences.

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T. I, CH. 3.

Restriction  
of effect of  
waiver.

“Where any actual waiver of the benefit of any covenant or condition in any lease on the part of any lessor, or his heirs, executors, administrators, or assigns, shall be proved to have taken place after the passing of this Act in any one particular instance, such actual waiver shall not be assumed or deemed to extend to any instance of any breach of covenant or condition other than that to which such waiver shall specially relate, nor to be a general waiver of the benefit of any such covenant or condition, unless an intention to that effect shall appear” (s. 6). **186.**

Compulsory alienations, as upon bankruptcy, are not within a mere general prohibition of alienation (a). **187.**

Relief  
against  
forfeiture.

Equity will interpose to prevent a forfeiture upon non-performance of a condition at or within a certain time, where the case admits of compensation being made for such non-performance (b). Thus, where there is no gift over or substituted disposition in the event of non-compliance with the testator's injunction, and that injunction relates only to the payment of money, equity will relieve against forfeiture, on subsequent payment of principal, interest, and costs (c). [And with reference to restrictions on and relief against forfeiture of leases, see *infra*, par. 1553 a.] **188.**

(a) Burton, § 854.

(b) 2 Cruise, T. 13, c. 2, § 29, 34;  
Co. Litt. 237 a, n. 1.

(c) 11 Jarm. & Byth. by Sweet,

900 (a); *Barnardiston v. Fane*, 2  
Vern. 366; *Grimstone v. Bruce*, *Id.*  
492.

## CHAPTER IV.

## OF TAKING ADVANTAGE OF THE BREACH OF CONDITIONS.

It is a rule of the common law, that no one can take advantage by entry of the breach of a condition expressed, but parties and privies in right and representation; as heirs of natural persons, as regards real estate; executors, or administrators of natural persons, as regards chattel interests; and the successors of bodies politic; unless the effect of the condition is not merely to give a right of entry, but to render the estate ipso facto void. So that privies and assignees in law, as lords by escheat and persons in remainder, cannot enter for an express condition broken, where it does not ipso facto avoid the estate (*a*). Nor, by the common law, could grantees and assignees of the reversion. But by stat. 32 Hen. 8, c. 34, grantees and assignees of the reversion may enter for breach in their time of conditions for payment of rent or performance of some act beneficial to the estate, but not of collateral conditions (*b*). And, by the same statute, a grantee of part of the estate of the reversion may take advantage of a condition (*c*). But a grantee of part of the land in which the reversion subsists could not; because a condition, being entire, could not be apportioned by the act of the grantor, although it may be apportioned by act of law, or by the wrongful act of a lessee (*d*). 189.

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Who may  
take advantage of a  
condition.

(*a*) 2 Cruise T. 13, c. 2, § 44, 45; Co. Litt. 214 a, b; 215 a, b; 1 Pres. Shep. T. 149; Burton, § 856.

(*b*) 2 Cruise T. 13, c. 2, § 48, 49; Co. Litt. 215 a, b; 1 Pres. Shep. T.

149, 151—3; Burton, § 856.

(*c*) 2 Cruise T. 13, c. 2, § 49; Co. Litt. 215 a.

(*d*) Id.. § 56, 57; Co. Litt. 215 a.

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By the stat. 22 & 23 Vict. c. 35, s. 3, it is enacted, that "where the reversion upon a lease is severed, and the rent or other reservation is legally apportioned, the assignee of each part of the reversion shall, in respect of the apportioned rent or other reservation allotted or belonging to him, have and be entitled to the benefit of all conditions or powers of re-entry for non-payment of the original rent or other reservation, in like manner as if such conditions or powers had been reserved to him as incident to his part of the reversion in respect of the apportioned rent or other reservation allotted or belonging to him." 190.

Even where lands are descendible to some other person as heir, none but the heir at common law can enter for a condition broken; but such entry will be for the benefit of the other person. Thus, if a person seised of lands in right of his mother, makes a feoffment in fee of them upon condition, and dies, and afterwards the condition is broken, the heir on the part of the father shall enter. But when he has entered, the heir on the part of the mother may enter on him (*a*). So, if a condition is annexed to an estate held in gavelkind, and is broken, the heir at common law must enter for the breach; but, after such entry, all the younger sons shall enjoy the estate with him (*b*). 191.

The heir cannot avail himself of a condition broken in the lifetime of his ancestor; for the right of taking advantage of a condition is merely personal (*c*). 192.

In the case of conditions implied or in law, privies and assignees in law may enter for conditions broken in their time (*d*). 193.

Where it is provided, that, on breach or performance of

(*a*) 2 Cruise T. 13, c. 2, § 46.

(*b*) 2 Cruise T. 13, c. 2, § 47.

(*c*) 1 Pres. Shep. T. 150.

(*d*) 2 Cruise T. 13, c. 2, § 45; 1

Pres. Shep. T. 115. See also *Allcock v. Moorhouse*, L.R. 9 Q. B. D. (Ap.) 366, which demonstrates the importance of privity of estate.



the condition, as the case may be, the estate shall be void, or that the grantor shall or may re-enter, there, if the estate is an estate of freehold, it can only be made void in either case by entry. But if it is for years, it will, in the first case, be ipso facto void; although, if the condition is for the benefit of the reversioner, the estate will only be void at his option (a). But where the Crown is entitled to land upon the breach of a condition, an office counter-vails an entry (b). And in case of advowsons, rents, commons, remainders, and reversions, where no entry is possible, a claim must be made at the church or upon the land, as the case may be (c). 194.

PART II.  
T. I, CH. 4.

Where a  
re-entry is  
necessary.

When a devise is made to the heir at law, notice is necessary to be given to him, before a forfeiture can attach for a breach of a testamentary condition; because the heir has a title paramount to the will, that is, by descent, and he is presumed to enter and claim in that right, and not to know anything of the devise or of the condition until he receives notice. But where a devise is made to a stranger, as he has no title except under the will, so he is presumed to have knowledge of the condition (d). 195.

Where  
notice of a  
condition  
must be  
given.

Where a person enters for a breach of an express condition subsequent, the estate becomes void ab initio, and as a general rule, the person who enters is again seised of his original estate in the same manner as if he had never conveyed it away. And hence all rights and incidents annexed to the estate defeated, such as dower and curtesy, with all charges, incumbrances, and interests created out of it, are likewise defeated (e). But, where the wife or husband had an estate in fee, subject to be divested by a

Effect of  
entry for a  
breach of an  
express con-  
dition.

(a) 1 Pres. Shep. T. 139; 2 Pres. Shep. T. 284; Co. Litt. 214 b.

(b) 2 Cruise T. 13, c. 2, § 39.

(c) 2 Cruise T. 13, c. 2, § 33.

(d) 1 Rop. Leg. by White, 840;

2 Jarm. Wills. 2nd ed. 12.

(e) 2 Cruise T. 13, c. 2, § 50—52;

Co. Litt. 202 a, and 202 b, n. 2;

Burton, § 355, 739; 1 Pres. Shep.

T. 121, 155.

**PART II.**  
**T. 1, CH. 4.**

shifting use or executory devise, and died before the shifting use or executory devise took effect, it was held that the surviving husband in the first case was entitled to curtesy, and that the surviving wife in the second case was entitled to dower (a). 196.

**Effect of  
entry for a  
breach of a  
condition in  
law.**

If a man enters for breach of a condition in law, he shall avoid all charges and acts done after the forfeiture was occasioned (b). 197.

(a) Burton. § 355.

(b) 1 Pres. Shep. T. 155.

## CHAPTER V.

## OF VOID CONDITIONS AND LIMITATIONS (a).

CONDITIONS requiring the performance of an act which is <sup>PART II. T. 1, CH. 5.</sup> contrary to the moral or municipal law, are void (b). 198.

Conditions of any kind which are contrary to the policy of the law, are also void (c). 199.

Thus, a condition or a clause of cesser and acceleration, requiring the acquisition of a peerage, or of a higher title in the peerage, is void, as contrary to public policy (d). 200.

A clause which is in general restraint of marriage is void, as contrary to religion, morality, and political, social, and private welfare, and therefore to the policy of the law. And such a clause is void, whether annexed to an estate or interest in real or in personal property, and whether by way of condition subsequent, properly so called, simply providing for the cesser of such estate or interest on marriage, or by way of conditional limitation defeating such estate or interest, and creating a new estate or interest in its room (e). And a condition or conditional limitation is void, not only if it is expressly in restraint of marriage generally, but also if it is so restricted that it is probable that it may virtually operate in restraint of marriage generally, whether there is a gift over or not (f), as, that

(a) See Part III. T. 12, Ch. 4, s. 1, as to Conditions of Bonds.

(b) See *Fearne*, 249, 276; 2 Cruise T. 13, c. 1, § 18.

(c) *Hodgson v. Halford*, L. R. 11 Ch. D. 959.

(d) *Egerton v. Earl Brownlow*, 4 H. L. Cas. 1.

(e) 1 Pres. Shep. T. 131; Story's Eq. Jur. § 274, 300; 2 Jarm. Wills. 2nd. ed. 35, 40; 2 Tudor's Leading

Cases in Equity, 179, 184; Lord Chief Justice *Wilmot's* remarks in *Low v. Peers*, Wilm. Opin. and Judg. 375; *Morley v. Rennoldson*, 2 Hare, 570; *Bellairs v. Bellairs*, L. R. 18 Eq. 510.

(f) See Story's Eq. Jur. § 274, 276—283; 2 Cruise T. 13, c. 1, § 53, 61, 64, 65; 1 Rep. Leg. by White, 759; *Lloyd v. Lloyd*, 2 Sim. (N. S.) 255.

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a woman shall not marry a man who has not an estate of 500*l.* a year (*a*), or shall not marry till fifty years of age, or shall not marry any person residing in the same town, or any person who is a clergyman, a physician, or a lawyer, or any person except of a particular trade or occupation (*b*). 201.

Conditions and conditional limitations in restraint of marriage in particular cases.

An exception, however, occurs in the case of the wife of the testator; for the law recognises in the husband such an interest in his wife's widowhood, as to make it lawful for him to restrain her from making a second marriage, by means of a condition subsequent or a conditional limitation as to real estate, or by means of a conditional limitation as to personal estate (*c*). And a similar exception exists in the case of the widow of any other person (*d*). Indeed, a condition or limitation in restraint of a second marriage, whether of a man or a woman, is valid (*e*). And if a testator devises or appoints real estate to his wife for life, with a proviso that if she should do anything whereby she should be deprived of the rents, or the power to receive or the control over the same, so that her receipt should not be a sufficient discharge, her life estate should cease; and she marries again, without making a settlement to her separate use, her life estate ceases (*f*). And in other cases, a clause in restraint of marriage may be good, if not so restricted as to render it probable that it may virtually operate in restraint of marriage generally. So that even a condition subsequent, properly so called, not to marry a particular person, or not to marry under the age of twenty-one years or without consent of parents or trustees or other persons specified, is good, in the case of real estate, or a charge on

(*a*) Story's Eq. Jur. § 280.

(*b*) Story's Eq. Jur. § 283; 2 Jarm. Wills. 2nd ed. 35.

(*c*) Co. Litt. 42 a; *Marples v. Bainbridge*, 1 Mad. 590; *Lloyd v. Lloyd*, 2 Sim. (N. S.) 255.

(*d*) *Newton v. Marsden*, 2 Johns. & H. 356.

(*e*) *Allen v. Jackson*, L. R. 1 Ch. D. (Ap.) 399.

(*f*) *Craven v. Brady*, L. R. 4 Eq. 209; 4 Ch. Ap. 296.

real estate, or things savouring of the realty. And à fortiori, where a clause provides, by way of conditional limitation, that if a person marry a particular person, or marry under age or without the consent of parents or trustees or other persons specified, real estate or a charge on real estate or things savouring of the realty shall go over to another person, such a conditional limitation is good. And the case is the same with respect to a condition or conditional limitation or a restriction, that a gentleman should not marry a female (generally) who was or had been a domestic servant (a). But all such conditions and conditional limitations are construed very strictly in favour of the person on whom such restrictions are imposed; because they are contrary to natural liberty, if not to public policy (b). 202.

If a devise of real estate is subject to a condition subsequent or a conditional limitation, to take effect on marriage of a female generally, and yet it appears not to have been the object of the testator to discourage the marriage of the devisee, but only to limit the provision to such time as there is need for it, namely, the time when she has no husband to provide for her, such a condition or conditional limitation is good, and the devise will cease on marriage (c). 203.

There is a very great distinction, however, connected with such restraints, between real property and charges on real property, and things savouring of the realty, on the one hand, and bequests of personal estate on the other hand. 204.

Distinctions between real and personal estate as regards such clauses.

The former are governed entirely by the common law; and by the common law, as applicable to real property and charges thereon and things savouring of the realty, if a

Rules as to real estate.

(a) *Jenner v. Turner*, L. R. 16 Ch. D. 188.

(b) *Story's Eq. Jur.* § 286.

(c) *Jones v. Jones*, decided by *Blackburn, J.* and *Lush, J.* (reversing

the decision of a Judge of the County Courts), L. R. 1 Q. B. D. 279. The case was one of a conditional limitation, as to which, in case of personalty, see *infra*, par. 207—8.

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condition seeks to restrain marriage generally and is void on that account, there, if the condition is precedent, no estate or interest will arise ; because no estate or interest was to arise except upon fulfilment of the condition, and yet no effect could be given to the condition, because it is contrary to public policy. And if the condition is subsequent or mixed, the estate to which it is annexed will be free from the condition, because such condition is contrary to public policy (a). Thus, if a testator were to say, "If A. shall not marry until she is fifty years of age, I devise an estate to her ;" this would be a condition precedent, and, operating in general restraint of marriage, it would be void ; but yet the estate would not vest in A. But if the testator had said, "I devise an estate to A., on condition that she do not marry till fifty years of age," this would be a condition subsequent properly so called. And if he had said, "I devise an estate to A. : but if she marry before she is fifty years of age, I give the estate to B.," this would be a conditional limitation. And, as such condition subsequent or conditional limitation would be in general restraint of marriage, it would be void on that account, and have no effect in divesting the estate given to A. ; so that the estate of A. would be absolute. But if a testator were to say, "If A. shall not marry until she has attained the age of twenty-one years, I give an estate to her when she shall have attained that age," that would be a good condition precedent ; so that A. would take the estate on attaining the age of twenty-one years, and not before. And if a testator were to say, "I devise an estate to A. on condition that she do not marry until she attain the age of twenty-one years," even without making any devise over on her marrying before that age, she would take the estate subject to divestment on marriage before that age. 205.

(a) Story's Eq. Jur. § 588—9 ; 2 129, 132, 133, 157 ; 2 Cru. Dig. T  
Bl. Com. 156—7 ; 1 Pres. Shcp. T. 13, c. 2, § 21.

On the other hand, in the case of bequests of personal estate, Courts of Equity have followed to a great extent the doctrines of the civil law, as administered by the Ecclesiastical Courts. And according to the civil law, conditions in restraint of marriage are even more odious than they are in the view of the common law; because in addition to the considerations of social and private happiness which are applicable alike to all nations and ages of the world, the depopulation of the Roman empire by war had rendered it peculiarly expedient to encourage the increase of population, and to discourage every attempt to check it (*a*). And hence it is the established doctrine of Courts of Equity in the case of bequests of personal estate, that where there is a condition *subsequent*, expressly or constructively providing for the cesser of the interest created in such personal estate in the event of marriage, and there is *no bequest over*, in that event, though the condition is so restricted as not expressly or virtually to operate in restraint of marriage generally, the condition is to be deemed as merely in *terrorem*, and the bequest is absolute, as if no such condition had been added. But if the partial restraint on marriage is not by way of a condition subsequent, properly so called, but by way of that species of condition which is called a conditional limitation, so that there is a bequest over on a marriage contrary to the condition, there the clause imposing partial restraint on marriage will be allowed to operate so as to divest the interest created in the personal property, in case of a marriage contrary to the condition (*b*). 206.

Different reasons have been assigned for this distinction as to personalty, between conditions and conditional limitations, or, in other words, between cases where there is, and cases where there is not, a bequest over (*c*). Some

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estate.

Reasons of  
the distinction  
as to  
personalty,  
between  
conditions  
subsequent.

(*a*) Story's Eq. Jur. § 276, 277, 278, § 66; 1 Rep. Leg. by White, 759, 279, n.; 2 Jarm. Wills, 2nd ed. 34. 827; 2 Jarm. Wills, 2nd ed. 35,

(*b*) Story's Eq. Jur. § 279, n., 36, 39.

284—289; 2 Cruise T. 13, c. 1, (*c*) See remarks of Sir W. Grant,

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and condi-  
tional limi-  
tations in  
restraint  
of marriage.

have said that the bequest over affords a clear manifestation of the intention of the testator that the clause should not be merely in *terrorem*. And certainly the bequest over does exclude all possibility of such a construction. But Lord Thurlow justly remarked (a), "I do not find it was ever seriously supposed to have been the testator's intention to hold out the threat of that which he never meant should happen." Others have said that it was the interest of the person claiming under the conditional limitation which made the difference; and that the testator having given him a substantial interest in a specified event, the Court is bound to effectuate the testator's intention. This of itself is a sufficient reason: but probably both reasons have equal operation in inducing the Court to give effect to the condition, where there is a bequest over. 207.

Illustrations  
of the dis-  
tinctions.

To illustrate these distinctions, as regards personal estate, if a testator were to say, "I give A. 1000*l.* on condition that she do not marry until she is fifty years of age;" or, "I give to A. 1000*l.*; but if she marry before she is fifty years of age, I give the same to B.;" the condition subsequent in the first case, and the conditional limitation in the second case being in general restraint of marriage, would be void, and of no effect upon the interest of A.; so that it would be absolute. Again, if a testator were to say, "I give to A. 1000*l.*; but if she marry before she is twenty-one years of age, then I give the same to B.;" this conditional limitation, being only in partial and reasonable restraint of marriage, would be operative; so that if A. were to marry before twenty-one the money would go to B. But if a testator were to say, "I give to A. 1000*l.*, on condition that she do not marry until twenty-one years of age," and there were no bequests over in case of her marrying before twenty-one, the condition

M. R., in *Lloyd v. Branton*, 3 Meriv. 117.

(a) *Scott v. Tyler*, 2 Dick. 719.



subsequent would be treated as merely in *terrorem*, and the legacy would be absolute. **208.**

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Conditions precedent in restraint of marriage, in the case of personal estate.

Thus much appears to be established. And it is also settled that, contrary to the rule in *devises*, if a bequest be made upon a condition *precedent*, which is *void*, as being in general restraint of marriage, the bequest will take effect as if no condition had been imposed (*a*). But it appears to be altogether doubtful upon authority what is the rule applicable to legacies of personal estate upon a condition *precedent*, not in restraint of marriage generally, but of a *limited* and legal character, where there is *no bequest over* and there has been a default in complying with the condition. Upon this subject, Mr. Justice Story (*b*) makes these remarks: "There are certainly authorities, which go directly to establish the doctrine, that there is no distinction in cases of this sort between conditions precedent and conditions subsequent; and that in each of them, *if there is no bequest over*, the legacy is treated as pure and absolute, and the condition as made in *terrorem* only. The civil law and ecclesiastical law recognise no distinction between conditions precedent and conditions subsequent, as to this particular subject. On the other hand, there are authorities which seem to inculcate a different doctrine and to treat conditions precedent as to legacies of this sort, upon the same footing as any other bequests or *devises* at the common law; that is to say, that they are to take effect only upon the condition precedent being complied with, whether there be a bequest over, or not." The same view of the doubtfulness of this point is taken by other text-writers (*c*). **209.**

But whichever of the two opinions noticed by Mr. Justice Story shall be deemed to be correct, there are

(*a*) Story's Eq. Jur. § 289.

(*b*) Eq. Jur. § 290.

(*c*) See 2 Jarm. Wills, 2nd ed. 37, 38; 1 Rep. Leg. by White, 826.

*Younge v. Furze*, 8 D. M. & G. 756, seems to decide that the latter doctrine is the correct one.

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Restraints  
on marriage  
by way of  
special or  
collateral  
limitation.

other very important distinctions which remain to be noticed. Hitherto we have only discussed the subject of restraints on marriage, when embodied in the form of conditions precedent or subsequent, or of conditional limitations, properly so called. We come now to the consideration of such restraints when embodied in that species of conditions, in the widest sense of the term conditions, which are often called by the simple term limitations in the sense of limits or bounds to an estate, but (as before remarked) may be more specifically termed special or collateral limitations, in order to distinguish them as well from conditional limitations, as from limitations in the sense of entire sentences creating estates. 210.

First, in the  
case of real  
estate.

It is laid down in Coke upon Littleton (42 a), that if real estate is given to a woman *durante viduitate*, such a limitation is good. And if such a restriction is good as a condition subsequent, properly so called (as we have seen it is), *à fortiori* it is good as a special limitation. 211.

According to the same authority, if real estate is given to a woman *dum sola fuerit*, such a limitation is good, although we have seen that if real estate were given to a single woman, subject to a condition subsequent or a conditional limitation providing that she should not marry, the condition or conditional limitation would be void, and the gift would be absolute. So great is the authority of Lord Coke, that we will assume that this is law; although, for the reasons which we shall presently give, when considering the case of a bequest of personalty, such a distinction would seem not to be founded on principle. 212.

Secondly, in  
the case of  
personalty.

But whatever may be the case with respect to real estate, a bequest of personalty to an unmarried person until marriage, or subject to a special or collateral limitation determining her interest on marriage generally, in whatever form of words that limitation may be couched,

would upon principle be void, as contrary to the policy of the law, as much as if marriage were sought to be restrained by a condition subsequent, or a conditional limitation, properly so called. And although the weight of judicial opinion is unquestionably in favour of the validity of such a special or collateral limitation, yet its validity may be considered to have been rather assumed, and assumed upon an erroneous supposition, than expressly decided. **213.**

First, let us consider the authorities. In the case of *Low v. Peers*, Lord Chief Justice Wilnot made some observations to show that such a special or collateral limitation, if couched in terms which directly express a *limit*, but do not necessarily imply a *prohibition*, was good by the civil law, and is also valid by the common law ; so that, according to his view, a gift to A. until marriage or during celibacy, is good both by the civil and common law ; though a gift to A. if she shall remain unmarried, which would be an indirect limitation, would be invalid by the civil law, unless not intended as a restraint on marriage. The actual decision in *Low v. Peers* was, that a covenant not to marry any person but a particular individual, who was under no obligation to marry the covenantor, was void, as a restraint on marriage generally, and therefore contrary to the policy of the common law. But the Lord Chief Justice makes the following most important observations bearing upon the present question : “ The cases of customs of manors and limitations of estate during celibacy, are modifications of property ; and though they do invite the proprietors of such estate to abstain from matrimony, yet they do not profess and avow the intention, as an estate given upon condition or an express agreement not to marry under a forfeiture does, where it figures in the shape of a penalty, and discloses a premeditated design to check marriage. But ” (he continues)

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“whatever weight there may be in the distinction between a limitation and a condition, it has long been settled and so often judicially recognised that it ought not now to be disturbed. And it is observable that it is not a subtlety of our law only; for the civil law makes the same distinction, and mentions the reason of it, which I have given.” And he then refers to Swinburn, 4th Part, c. 12, ss. 6, 19. Swinburn says (s. 6), “Moreover if a testator do bequeath any legacy to a woman conditionally, if she do not marry; willing her to restore the same to another if she do marry, albeit in this case the woman do marry, she may obtain the legacy; neither is she bound to restore the same, unless it was the meaning of the testator not to forbid marriage, but to grant the use of the thing bequeathed until the legatary did marry.” On the other hand, at s. 19, Swinburn says, “The 9th limitation is when the prohibition of marriage is not made conditionally by the word ‘if,’ as ‘I make thee my executor if thou dost not marry,’ but by other words or adverbs of time, as when the testator willeth that his daughter or wife shall be executrix, or shall have the use of his goods ‘so long’ as she shall remain unmarried. Agreeable hereunto are the laws of this Realm of England, wherein there is a case that one of the Kings of this Realm did grant to his sister the manor of D., so long as she should continue unmarried, and this was admitted to be a good limitation in the law, but not a condition.” The Lord Chief Justice Wilmut, after citing these passages from Swinburn, then adds, “The common law, therefore, in allowing such limitations, does not discover more favour to restraints upon matrimony than the civil law does. Both allow a modus as qualifying and limiting the duration of property, but reject a condition.” **214.**

According to the way in which Swinburn has stated the doctrine in the passages cited by Lord Chief Justice

Wilmot, the principle of the distinction is this : that where the testator, by the form of his bequest, has necessarily implied a desire of restraining marriage generally, there the law will not allow his intention to be accomplished even by a limitation incorporated in the words of the gift, and even with a superadded limitation over. But that where the form of his bequest does not necessarily imply such an intention, but only expresses the limit to the continuance of the interest given, there the limitation is valid. But the Courts of this country in refusing operation to expressions in restraint of marriage generally, have not generally been governed by the speculation as to what were the motives of the testator, but by the practical effect of the disposition made by him upon the well-being of the individual who is the object of his bounty, or of the community at large. So that (as we have seen) the question has been, Does or does not the disposition operate in express restraint of marriage generally ; or is it, or is it not likely that it will virtually operate in restraint of marriage generally? 215.

The principle mentioned by Swinburn is of such a character that it would require very clear proof that such was the doctrine of the civil law before we ought to accept it as such. The passage, however, to which Swinburn refers in support of his proposition that a direct special limitation in restraint of marriage generally was valid by the civil law, is this : "*Legatum ita est : Attiæ donec nubat, quinquaginta damnas esto heres meus dare ; neque adscriptum est, in annos singulos : Labeo, Trebatius, præsens legatum deberi putat. Sed rectius dicetur id legatum in annos singulos deberi*" (a). But this passage, though it mentions a direct limitation till marriage—"To Attia until she marry"—does not prove that it was good by the civil law : the decision does not assert or assume

(a) Dig Lib 33, Tit. 1, L. 17.

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that it was good: it merely puts a case in which such a limitation occurred, for the purpose of raising a question as to whether an annual sum of the amount specified was given or not; so that unless other passages can be cited to prove that a direct special limitation on marriage generally was good by the civil law, it would not seem that we ought to consider it to be so. And as to an indirect limitation on marriage generally, that we have seen Swinburn himself admits to be bad, unless it was not the design of the testator to forbid marriage generally. **216.**

Lord Cottenham, however, in *Webb v. Grace (a)*, assumes the validity of a special limitation on marriage generally. He says, "There can be no doubt that marriage may be made the ground of a limitation ceasing or commencing. It is unnecessary to refer to authorities for this purpose. If then, this grant is a grant of 40*l.* per annum until marriage, and from that event happening of 20*l.* per annum for life, there can be no doubt but that such a gift is lawful; and that after marriage there can be no demand for the 40*l.* per annum." But in that case a reduced sum was given on marriage, and it was a case of covenant. **217.**

In *Rishton v. Cobb (b)*, Lord Cottenham again assumed the validity of a limitation in restraint of marriage generally. But in that case the lady was a widow, and was married a second time at the date of the will; and it was held that she was absolutely entitled notwithstanding that fact: so that Lord Cottenham's remarks were extrajudicial. **218.**

In *Lloyd v. Lloyd (c)*, Lord Cranworth says, "A testator may make a gift so long as she shall remain single; but if he first gives a life estate to a single woman, a stranger to

(a) 2 Phil. 702.

(b) 5 My. & Cr. 152.

(c) 2 Sim. (N. S.) 263.

him, and then annexes a condition that in case she marries at all, it shall go over, that being in general restraint of marriage, is not a good condition." But these remarks were all extra-judicial, so far as they referred to a special limitation; for the case was one of a conditional limitation. **219.**

In *Bullock v. Bennett* (a), no question seems to have been raised as to the validity of the limitation "until marriage;" and as the lady had been twice married before, and the property in the case of her marriage a third time was given in trust for her children by her former husbands, no objection could be reasonably urged against such a limitation. **220.**

Down to the case of *Heath v. Lewis* (b), there is no decision (it is believed) that a direct or indirect limitation until marriage generally, in the case of a bequest to a single man or woman, is valid. In that case, which was heard before the Lords Justices, but not on appeal, an annuity was bequeathed to an unmarried woman during the term of her natural life, if she should so long remain unmarried; and it was held that this was a limitation, as it certainly was, and not a condition subsequent; and that therefore the annuity ceased on marriage. The Lord Justice Knight Bruce there said, "It must be agreed on all hands that it is by the English law competent for a man to give to a single woman an annuity until she shall die or be married, whichever of these two events shall first happen. All men agree that if such a legatee shall marry, the annuity will thereupon cease. But" (added his Lordship) "this proposition has been advanced—a proposition, if true (and I do not deny its truth), perhaps not creditable to the English law—that if a man gives an

(a) 1 K. &amp; J. 315; 7 D. M. &amp; G.

(b) 3 D. M. &amp; G. 954.

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annuity to a woman who has never married, for life, and afterwards declares that if she shall marry, the annuity shall be forfeited, the condition is void, and she may yet marry as often as she will, and retain her annuity. Such is the state in which our English law upon this subject is said, and perhaps truly, to be ; and the question argued before us has been, to which of these two classes the gift in this will belongs, being a gift of an annuity to a single lady 'during the term of her natural life, if she shall so long remain unmarried ;' this language being the technical and proper language of limitations, as distinguished from conditions, long known to the English law, and familiar to us all. Both upon precedent and reason, upon principle and authority, I am of opinion that this is a limitation, as distinguished from a condition, and that the annuity ceased when the lady married." But this cannot be considered to have the weight of a decision as to the validity of such a limitation, because it was admitted at the bar, that, if it was a limitation, and not a condition subsequent, it would be valid. 221.

In *Potter v. Rickards* (a), the Vice-Chancellor Kindersley decided in favour of the validity of a bequest until marriage generally, but expressed at the same time his inability to justify the distinction ; observing that "the policy of the law was as much violated by saying that a woman should only retain an annuity so long as she remained single, as saying that it should cease upon such woman being married : the law as to restriction upon marriage was in both cases equally violated" (b). 222.

Now the common ground of this distinction in favour of the validity of a special limitation until marriage, is expressed by the Vice-Chancellor Wigram in *Morley v.*

(a) 3 W. R. 266. See also *M' Culloch v. M' Culloch*, 3 Gif. 606 ; *Evans*

*v. Rosser*, 2 Hem. & Mil 190.  
(b) 3 W. R. 267.



*Renoldson (a)*. The case itself was a case of a conditional limitation by codicil, and not of a special limitation, so that the remarks of the Vice-Chancellor were extra-judicial; but they express the reasons commonly and confidently assigned for the validity of such limitations. "Until I heard" (observes the Vice-Chancellor) "the argument of this case, I had certainly understood, that, without doubt, where property was limited to a person until she married, and when she married, then over, the limitation was good. It is difficult to understand how this could be otherwise, for in such a case there is nothing to give an interest beyond the marriage. If you suppose the case of a gift of a certain interest, and that interest sought to be abridged by a condition, you may strike out the condition, and leave the original gift in operation; but if the gift is until marriage, and no longer, there is nothing to carry the gift beyond the marriage. With reference to that point, and also in order that the grounds of my decision might clearly appear to those parties against whom it might be, I wished to look into the authorities; and I am satisfied, from an examination of those authorities, that there is no reason to alter my opinion, that a gift until marriage, and when the party marries, then over, is a valid limitation." **223.**

To this current of judicial opinion the decision in *Wren v. Bradley (b)* is directly opposed. A testator bequeathed an annuity to his daughter, a married woman, "in case she shall be living apart from her husband, and should continue so to do," during the lifetime of his widow; with a direction, that if at any time the annuitant should live with her husband, the annuity should cease. By the same will he bequeathed a share in the residue, upon trust to pay the income to the same daughter during such time as she should continue to live apart from her said husband;

(a) 2 Hare 579, 580.

(b) 2 De Gex &amp; Sm. 49.

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but should she at any time live with him, the testator directed that during such time the income should be paid between other legatees. At the date of the will, the daughter and her husband were living apart, but before and at the date of the testator's death, they were reconciled, and living together, and so continued to live : and it was held, that the daughter was entitled to the bequests. 224.

This is a decision that restrictions which are invalid as conditions are equally invalid as special or collateral limitations. And indeed the opposite doctrine depends on a fallacy. It proceeds upon the notion that in such cases the special limitation is the only limitation ; whereas there is ordinarily (as we have before seen) a general limitation, either express or implied, to denote the class or denomination to which the estate or interest belongs, even when there is also a special or collateral limitation (*a*). And it is equally possible to reject a special or collateral limitation, as it is to reject a condition subsequent. If rejected the interest would last for the period assigned it by the express or implied general limitation, for life or otherwise (*b*). And it ought to be rejected as contrary to the policy of the law, as much as a condition subsequent properly so called. 225.

Although a general limitation, either express or implied, is ordinarily incident to every estate, even where there is a special or collateral limitation, yet a gift in the will in *Potter v. Richards* (*c*), (on which, however, nothing turned, as it was revoked by a codicil) furnishes us with a special limitation so framed as to constitute the only distinct limitation. The gift was in these words : "To J. P. an annuity of 50*l.* during such part of her life as she continues single and unmarried." And of course if the Court had to deal with such a form of words, it would involve much

(*a*) See *supra*, par. 162—7.

ests annexed to *Fearne*, § 28—36.

(*b*) See *Smith's Executory Inter-*

(*c*) 3 W. R. 267.

more difficulty to strike out the special limitation as the only distinct limitation, than it would in other cases where there is also a distinct general limitation expressed or implied. **226.**

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It would seem to be the common notion that in cases where marriage forms the subject of a direct special limitation (as where a gift is made till marriage, or whilst single, or during celibacy, or so long as the person continues unmarried) the interest given must *necessarily* determine on marriage, inasmuch as by the very terms of the gift it *could not possibly last any longer*. But those who entertain this opinion have regarded the special limitation as a substitute for the general limitation, so as to constitute the *only* limit to the estate. That this, however, is an erroneous view, may be shown from the example of an annuity bequeathed to A. and her assigns until her marriage. Now it is true that the words "until her marriage" appear to constitute the only limitation. And yet they do not; for if they did, then it would follow that if A. were never to marry, the annuity would last for ever. But that would be contrary to the nature of an annuity, which *prima facie* imports a life annuity only. **227.**

It will be objected that if we were to reject the special limitation, we should be altering the gift itself; whereas by striking out a condition subsequent or a conditional limitation, we simply leave the original gift unaffected. But to what does this objection amount? It is quite unsubstantial: it is merely a verbal refinement. As regards the substantial intention of the testator, the gift is as much affected by striking out a condition subsequent or a conditional limitation, as it would be by striking out a special or collateral limitation; and it is quite as easy to reject the special or collateral limitation, as to reject the condition subsequent or the conditional limitation. And if the latter must be rejected, for the strongest religious,

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moral, political, and social reasons, it is equally incumbent on the Courts to reject the former, as both are equally injurious. And if it is a maxim that that shall not be done indirectly which cannot be done directly, surely it is deeply to be deplored that the Courts should profess their inability to prevent a testator from violating the policy of the law in a most important respect, merely because he seeks to accomplish his design by grammatically incorporating the restraint into the very words of the gift itself, instead of superadding the restraint to the words of gift. Such a course of judgment was fitting enough for days of scholastic ingenuity, when (if we may repeat the expression of Lord Coke) judges delighted to "disport themselves" with subtleties at the expense of sound reason and justice; but it should find no place in the nineteenth century. Whether the interests of religion and morality, of social happiness and national welfare, should be allowed to be contravened or not, ought no longer to be dependent upon the difference between two forms of words, both intended to accomplish the same design, and calculated to produce the same mischief. It is such judicial decision as this, which has tended to cause the practice of the law (and not unreasonably in such instances) to be regarded as a system of hair-splitting and quibbling, rather than of substance. 228.

Condition  
in restraint  
of cohabitation.

If a testator attempts, whether by way of condition or limitation, to restrict a married woman from cohabiting with her husband, such condition or limitation is void, and a gift of personalty to which it is annexed will be good (a). 229.

Conditions  
as to a separation.

In some early cases it appears to have been considered that a deed providing for a future separation is valid (b).

(a) See *Wren v. Bradley*, 2 De G. & S. 49.

307—310; and see *Rodney v. Chambers*, 2 East, 283; *Chambers v.*

(b) See *Bright's Husb. & Wife*,

*Caulfield*, 6 East, 244.

But a covenant before marriage that in case of any separation taking place between the husband and wife, the husband shall make a certain provision for his wife, is void. For if the bad conduct of the wife *may be* the contingency on which the husband will be bound to make the provision, it has been remarked that such a covenant may prove "an inducement to the wife to be guilty of the most atrocious conduct, in order to entitle herself to the provision" (a). **230.**

And it has been held, that where certain rights are conferred by an ante-nuptial settlement on the intended husband and wife, subject to a proviso for materially varying those rights in favour of the husband, in the event of a separation, by reason of any disagreement, or otherwise, taking place, such a proviso is void, even though the settlement be made by the husband's father (b). **231.**

Indeed, it has been broadly laid down that provisions which have reference to future separation, are against the policy of the law (c). **232.**

A condition imposed upon a married woman to cease to reside at a place where her husband then resides is bad (d). **233.**

Conditions in restraint of trade generally, or beyond what is reasonably necessary for the protection of the party seeking it, are void, as tending to discourage industry, enterprise, and just competition. But a person may be restrained from carrying on trade in a particular place, or with particular persons, or for a reasonable limited time. And where reasonable under the circumstances the prohibi-

Conditions  
in restraint  
of trade.

(a) *Cocksedge v. Cocksedge*, 14 Sim. 244, 247.

(b) *Cartwright v. Cartwright*, 3 D. M. & G. 982, 989; *H— v. W—*, 3 K. & J. 382.

(c) *Cartwright v. Cartwright*, 3 D. M. & G. 982, 989; *Westmeath v. Salisbury*, 5 Bligh, 339; S. C. nom.

*Westmeath v. Westmeath*, 1 Dow. & Cl. 519; *Durant v. Fitley*, 7 Price, 577; *H— v. W—*, 3 K. & J. 382, 386—7; *Merryweather v. Jones*, 4 Gif. 499.

(d) *Wilkinson v. Wilkinson*, L. R. 12 Eq. 604.

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tion may be even unlimited (a). And a person may lawfully sell a secret in his trade or business, and restrict himself from using the secret (b). **234.**

Repugnant  
conditions.

Conditions are illegal when they are repugnant, that is, inconsistent with the estate or interest to which they are annexed (c); as where a conveyance is made of land in fee, on condition that the grantee shall not enjoy the land, or shall not take the profits of the land, or that his heir shall not inherit the land, or that he shall not do waste, or that his wife shall not be endowed (d); or where lands are given or granted to two and their heirs, on condition that the survivor shall have the whole notwithstanding partition, or on condition that the survivor shall not have the whole, albeit there be no severance (e). But a conveyance in fee may be made with a restriction, by way of use, against carrying on certain trades on the property (f). **235.**

[When a gift is made to a person, but in case the person shall die before he shall have actually received it, then over, the gift over has, in some cases, been held valid, in others void. There appears to be some conflict of judicial authority upon the point (g).] **235a.**

If, instead of an express or constructive gift for life, with a limitation over to uses to be appointed by the exercise of a power, followed by a limitation over in default of appointment, real or personal property is limited

(a) *Rousillon v. Rousillon*, L. R. 14 Ch. D. 351.

(b) *Story's Eq. Jur.* § 292; *Benwell v. Inns*, 24 Beav. 307; *Harms v. Parsons*, 32 Beav. 328; *Catt v. Tourle*, L. R. 4 Ch. Ap. 654; *Leather Cloth Co. v. Lonsont*, L. R. 9 Eq. 345; *Allsopp v. Wheatcroft*, L. R. 15 Eq. 59.

(c) 2 Cruise T. 13, c. 1, § 20; 1 Rop. Leg. by White, 785; 1 Jarm. Wills, 2nd ed. 12.

(d) 1 Pres. Shep. T. 131; Co. Litt. 206 a.

(e) 1 Pres. Shep. T. 131.

(f) *Hodson v. Coppard*, 29 Beav. 4.

(g) *Johnson v. Crook*, L. R. 12 Ch. D. 639; *Bubb v. Padwick*, L. R. 13 Ch. D. 517; *Chaston v. Seago*, L. R. 18 Ch. D. 218, and the authorities cited in the judgments in those cases.

directly to or to the use of a person, in terms which would confer a fee in the real property, or an absolute interest in the personal property, such property cannot be limited over in the event of such person not exercising the power over it with which he is clothed by the law itself, as an incident to property. So that if it is limited over in the event of the devisee or legatee, to whom the fee or an absolute interest is given, dying intestate, or not using or disposing of the property, such limitation over is deemed repugnant to the prior gift and void, and the devisee or legatee takes an absolute and indefeasible interest, unaffected by the limitation over (a). **236.**

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Conditions in restraint of alienation are sometimes void, as being repugnant to the estate or interest granted, devised, or bequeathed. **237.**

Conditions for cessor on alienation, bankruptcy, or insolvency (b).

Where a conveyance or devise is made of real property for an estate in fee, or a conveyance or bequest of the absolute interest in personalty (except for a woman's separate use), subject to a condition or injunction which is actually or virtually in general restraint of alienation, such a condition or injunction is void, as a power of alienation is inseparably incident to such an estate or interest. But a condition not to alien real or personal estate to a particular person, or for a particular time, or

(a) *Lightburn v. Gill*, 3 B. P. C. 250; *Ross v. Ross*, 1 Jacob and Walker, 154; *Attorney-General v. Hall*, Id. 158; *Cuthbert v. Purrier*, 1 Jacob, 415; *Green v. Harvey*, 1 Hare, 428; *Byng v. Lord Strafford*, 5 Beav. 558, 567; *Bull v. Kingston*, 1 Meriv. 314; *Watkins v. Williams*, 3 Mac. & Gord. 622; *In re Yulden*, 1 D. M. & G. 53; *Re Mortlock's Trust*, 3 K. & J. 456; *Hughes v. Ellis*, 20 Beav. 193; *Barton v. Barton*, 3 K. & J. 512; *Henderson v. Cross*, 29 Beav. 216; *Holmes v. Godson*, 8 D. M. & G. 152, a special

case heard by the Lords Justices originally, and not on appeal; *Greated v. Greated*, 26 Beav. 621; *Weale v. Ollive* (No. 2), 32 Beav. 421; *Perry v. Merritt*, L. R. 18 Eq. 152; *In re Wilcocks' Settlement*, L. R. 1 Ch. D. 229.

(b) As to the effect of an annulment of bankruptcy in avoiding conditions relating to bankruptcy, see *White v. Chitty*, L. R. 1 Eq. 372; *Lloyd v. Lloyd*, L. R. 2 Eq. 722; *Cox v. Fonblanque*, L. R. 6 Eq. 482.

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out of the family, is good. And if a bond is given not to alien, the penalty may be recovered, in case of alienation. And if a conveyance, devise, or bequest of property, real or personal, is made upon the condition that the grantee, devisee, or legatee shall not alien other property of his own, such a condition is good, because there is no repugnancy (a). 238.

A tenant in tail or his heirs could not be restrained from suffering a recovery by any condition, limitation, proviso, custom, recognizance, statute, trust, covenant, or otherwise; because the right to suffer a recovery was an inseparable incident of an estate tail. Nor could he or his heirs be restrained from levying a fine within the statute of 4 Hen. 7, c. 24, and 32 Hen. 8, c. 36. But any tortious alienation by feoffment, fine at common law, or any other alienation which worked a discontinuance, might be prohibited by a condition (b). 239.

If a person seised in fee of land makes a lease of it for years or life, on condition that the lessee shall not alien the land leased or any part thereof during the term, or on condition that he shall not alien it or any part of it during the term without licence of the lessor, these are good conditions, on account of the privity and the relation of lord and tenant. And so if a lessee makes an underlease, upon condition that the underlessee shall not alien, the condition is good. But if a person, possessed of a lease for years of a house, or of any chattel real or personal, gives or sells all his interest therein, upon condition that the donee or vendee (generally, and not partially, and

(a) 1 Pres. Shep. T. 76; 2 Pres. Shep. T. 371; Co. Litt. 206 b, 223 a, b; 1 Cruise T. 1, § 49; 2 Cruise T. 13, c. 1, § 22; Burton, § 26; 1 Rep. Leg. by White, 785, 787; 2 Jarm. Wills, 2nd ed. 13; *Ware v. Cann*, 10 B. & C. 433; *Attwater v. Attwater*, 18 Beav. 330; *Hood v.*

*Oglander*, 34 Beav. 513; *In re Macleay*, L. R. 20 Eq. 186.

(b) Co. Litt. 223 b. n. 1, and 224 a, b, 379 b, n. 1; 2 Jarm. Wills, 2nd ed. 15; Watk. Conv., 3rd ed. by Prest. 70, 71; *Darwins v. Lord Prarhyn*, L. R. 6 Ch. D. (Ap.) 318; 4 Ap. Cas. 51.



under due restraints) shall not alien the same, this condition is void for repugnancy, and the gift or sale is absolute (a). And where alienation of a term for years is prohibited by a lessor, the original limitation must not be to the lessee and his assigns; for that would be a contradiction (b). 240.

Personal property cannot be given for life, any more than absolutely, without the power of alienation being incident to the gift, so long as the estate or interest remains in the owner, except in the case of a gift for a woman's separate use (c). But a condition in a lease for years, that the landlord shall re-enter on the tenant's becoming a bankrupt, is good (d). And the owner of property may on alienation make the interest of the alienee determinable on bankruptcy, insolvency, or alienation, by means of a proviso for reverter or cesser, or a condition, or a special limitation, or a conditional limitation (e). Thus, where there is a limitation over of a life interest for the benefit of the children of the tenant for life, in case he should in any manner charge, assign, incur, or anticipate the income or any part thereof, or if the same or any part thereof should by operation of law, either by bankruptcy, insolvency, or any other ways or means whatsoever, be assigned or become payable to any other person or persons whatsoever, or be or become

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(a) 1 Pres. Shep. T. 131, 176; Co. Litt. 223 b, and n. 1.

(b) Burton, § 852.

(c) *Brandon v. Robinson*, 18 Ves. 429; *Barton v. Briscoe*, Jac. 603; *Turner, V.-C.*, in *Rochford v. Hackman*, 9 Hare, 480; 2 Jarm. Wills, 2nd ed. 30; see infra, Part IV., T. 1, c. 3, s. 5, iii.

(d) 2 Cruise T. 13, c. 1, § 50.

(e) *Brandon v. Robinson*, 18 Ves. 433; Burton, § 737; supra, par. 165—171; 11 Jarm. & Byth. by

Sweet, 486; 2 Spence's Eq. Jur. 89, 90; 2 Jarm. Wills, 2nd ed. 24, 30; *Martin v. Margham*, 14 Sim. 230; *Turner, V.-C.*, in *Rochford v. Hackman*, 9 Hare, 481; *Sharp v. Coe*, 20 Beav. 470; *Joel v. Mills*, 3 K. & J. 458; *Wood, V.-C.*, in *Whitmore v. Mason*, 2 Johns. & Hem. 209, 210; *Craven v. Brady*, L. R. 4 Eq. 209; 4 Ch. Ap. 296; *In re Amherst's Trusts*, L. R. 13 Eq. 464; *Hatton v. May*, L. R. 3 Ch. D. 148.

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applicable to or for any other purpose than for the prospective maintenance of the tenant for life, such a limitation over is valid (a). And if the income of a fund is made payable to a person for his life, "or until he should do or suffer any act" whereby it should become payable to another person, his life interest will be forfeited, if a judgment creditor of his obtains a charging order against the fund (b). But where the terms of the prohibition are such, that they may refer only to an assignment or charge by the act of the party himself, and not to an assignment by operation of law, or to an act of insolvency not causing a *cessio bonorum*, it has sometimes been held, that the property will not go over on an assignment by operation of law, or on such an act of insolvency, but, on the bankruptcy or insolvency of the tenant for life, will pass to his assignees (c). And where the limitation over is substantially a provision for him alone, or for him jointly with others, whether through the instrumentality of a discretionary power in trustees or otherwise, it will be invalid, and his assignees or creditors will be entitled during his life to the whole or to his share, as the case may be (d). 241.

Although, as we have seen, the owner of property may limit it in favour of another, so as to render the interest of such other person determinable on his bankruptcy, yet the owner of property cannot so limit it in favour of himself, as to render *his own* interest determinable on his bank-

(a) *Yarnold v. Moorhouse*, 1 Russ. & My. 364; see also *Joe v. Mills*, 3 K. & J. 458; *White v. Chitty*, L. R. 1 Eq. 372; *Lloyd v. Lloyd*, L. R. 2 Eq. 722; *Billson v. Crofts*, L. R. 15 Eq. 314.

(b) *Roffey v. Bent*, L. R. 3 Eq. 759.

(c) 2 Jarm. Wills, 2nd ed. 25—27. See *Lear v. Leggett*, 1 Russ. & My. 690; 2 Sim. 479; *Pym v. Lockyer*, 12 Sim. 394. But see

*Rochford v. Hackman*, 9 Hare, 475; *Brandon v. Ashton*, 2 Y. & C. C. C. 24; *Churchill v. Marks*, 1 Coll. 441; *Graham v. Lee*, 23 Beav. 388; *Arisson v. Holmes*, 1 Johns. & H. 530, 540, and cases stated in the reporter's note to p. 540; *Townsend v. Early* (No. 2), 34 Beav. 25; *Montefiore v. Bekrens*, L. R. 1 Eq. 171; *Montefiore v. Enthoven*, L. R. 5 Eq. 35.

(d) 1 Rep. Leg. by White, 794.

ruptcy, and thereby defeat his creditors. And on the same principle a provision in a deed of partnership, that, in the event of the bankruptcy or insolvency of a partner, his share should go over to his co-partners, is void, as being in fraud of the bankrupt laws (a). **242.**

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An assignment of arrears of income is not within the meaning of a proviso of cesser of income in a will, in case the party entitled should attempt or endeavour to anticipate or otherwise assign or incumber the income (b). **243.**

Conditions are void if they are contrariant in themselves; as in the case of a proviso for determining an estate tail as if the tenant in tail were dead, without adding any such words as "and there were a general failure of issue inheritable under the entail" (c). **244.**

Contrariant  
conditions.

Conditions are void if they are uncertain or ambiguous; as in the case of a proviso against advisedly and effectually attempting, etc., to alien (c). **245.**

Uncertain  
or am-  
biguous con-  
ditions.

Conditions are void if they are impossible at the time of their creation, or afterwards become so, by the act of God, by the act of law, or by the act of the party who is entitled to the benefit of them (d). If there are two things, in the copulative, required by the condition to be done, both must be done, otherwise the condition will not be performed, unless one of them becomes impossible by the act of God, or by the act or default of the opposite party (e). But where a condition consists of two parts, in the disjunctive, and the party has an election which of them to perform, both being possible at the time of creating the condition, but one of them afterwards becomes impossible by the act of God, this will in some cases excuse the performance of both (f). **246.**

Impossible  
conditions.

(a) *Whitmore v. Mason*, 2 Johns. & Hem. 204.

(b) *In re Stultz's Trusts*, 4 D. M. & G. 404.

(c) *Smith's Executory Interests*

annexed to *Fearne*, § 696.

(d) *Ib.*; Co. Litt. 206 a, b, 209 a.

(e) 1 Pres. Shep. T. 144.

(f) 2 Cruise T. 13, c. 2, § 24; Co. Litt. 225, a, n. 1.

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possibility.

A condition is void if the contingency is too remote a possibility. It would seem that "a limitation may depend on any number of contingencies, even though they may be engrafted on each other, so long as each amounts to a common probability, and so long as they may, according to common probability, grow out of, or be connected with, each other, in the manner specified by the instrument containing the limitation. But a limitation is invalid when made to depend on a single contingency, if it is made to depend on too remote a possibility, or when made to depend on two contingencies, if, according to common probability, they do not grow out of, or are not connected with, each other, in the manner specified" (a). **247.**

Condition  
not to dis-  
pute a will.

It is a valid condition in a will of real estate, that, if the devisee shall dispute the will, or the testator's competency to make it, or shall refuse, when required by the executors, to confirm it, the disposition in favour of such devisee shall be revoked, and the property shall go over (b). **248.**

It has been said, however, that in the case of personal estate, there is this distinction, that where a testator imposes on a legatee a condition, that he shall not dispute the will, such a condition is regarded as in terrorem only; and therefore a legatee will not, by having contested the validity or effect of the will, forfeit his legacy, where there was *probabilis causa litigandi*, unless the legacy is given over upon breach of the condition (c). **249.**

From the cases in which the condition is that the legatee shall not dispute a will, and in which there is no gift over on disputing it, we must distinguish those in

(a) Smith's Executory Interests annexed to Fearn, § 697—8. See also 2 Pres. Shep. T. 515.

(b) 2 Jarm. Wills, 2nd ed. 47; *Cooke v. Turner*, 15 M. & W. 727; 14 Sim. 493.

(c) See 2 Jarm. Wills, 2nd ed. 46; 1 Rep. Leg. by White, 795; *Powell v. Morgan*, 2 Vern. 90; *Lloyd v. Spillett*, 3 P. W. 344; *Morris v. Burroughes*, 1 Atk. 471; *Clearer v. Spurling*, 2 P. W. 526.

which a legacy is given upon an express condition to release the testator's estate, or not to disturb the trustees of the will, and there is no gift over. For, in this case, the legatee is put to his election by virtue of the express condition to release or not to disturb the trustees, whether there is a gift over or not (*a*). **250.**

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And there are many other cases in which a legatee is put to his election, without any express condition, upon the principle that no one shall claim under and in opposition to the same instrument; a tacit condition being deemed to exist in such cases, that the person taking do not disturb the disposition which his benefactor has made (*b*). **251.**

Where there is a condition not to dispute a will, but there is no gift over on breach of the condition, such a condition is open to the construction that the testator's object is only to restrain vexatious litigation, and not to debar the legatee from asserting his right where there is *probabilis causa litigandi*. In such cases, therefore, the Court is not actually driven to reject the condition, but merely puts such a construction upon it, that the legatee does not forfeit his legacy merely by the asserting of a reasonable claim. This constitutes a distinction between such cases, and those cases where the condition is to release: in which the condition is incapable of being so explained away. **252.**

The construction, however, which imputes to the testator an intention merely to restrain vexatious litigation, could not be put on any higher footing than mere conjecture. **253.**

But the fact is, it was not founded in any presumable intention, but in an imitation of the *in terrorem* doctrine of legacies given subject to a condition subsequent in partial restraint of marriage; a doctrine that originated in

(*a*) *Webb v. Webb*, 1 P. W. 135;  
*Duke of Northumberland v. Lord*  
*Egremont*, 2 Amb. 657.

(*b*) See *infra*, Part IV., T. 2, c. 4,  
on "Election."

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a desire on the part of the judges of the Court of Chancery, in early times, to conform their doctrines to those of the judges of the Ecclesiastical Courts, who followed the civil law, under which conditions in restraint of marriage were void. But it does not appear that conditions not to dispute a will were void by the civil law ; so that there was no need of inventing any such construction as the *in terrorem* doctrine, with a view of getting rid of *them*, in order to avoid a conflict with the Ecclesiastical Courts. And such a construction imputes to the testator an improbable intent. To suppose either that he only meant to restrain vexatious litigation, or that if he meant to refer to litigation or contention generally, he only inserted the words as a threat, without intending that they should have any divesting operation, is to suppose that which is contrary to the general principles of election on which so many cases have been decided, especially in modern times—the principle that no one shall claim both under, and in opposition to, the same instrument,—that no one, while he accepts the bounty of a testator with one hand, shall proceed with the other to overturn the disposition which the testator had made in favour of other persons. The cases in which the Court has considered conditions not to dispute a will as only relating to vexatious litigation, or as only added in *terrorem*, if they are still law, seem to constitute a most anomalous exception to the rule of election. Under the doctrine of election, a person is debarred from accepting the testator's bounty, and yet disputing the will in other respects ; and he is so debarred in a number of cases upon a mere implication or tacit or presumed condition, that he shall not claim under and in opposition to the same instrument. Much more, then, should he be debarred from so doing, where there is an express condition that he shall not dispute the will. And as no such doctrine prevails in the case of real estate, it is

absurd that it should exist in the case of personal estate, without any real reason for a distinction. And it is not unlikely that if the question were now to arise before a Court of Appeal, the Court would consider that the few early cases which favoured such a doctrine were overruled by the numerous cases in which the doctrine of election had been established, or were no longer binding, as having been decided merely upon an imaginary analogy to the case of restraint on marriage, or otherwise contrary to sound principle. But until it shall be decided that these cases are no longer law, it will be very important to bear them in mind, and avoid the probability of disappointing the intention of testators, and all chances of doubt and litigation, by limiting over the property on breach of a condition not to dispute a will, if any such condition is desired to be inserted. **254.**

Where a testator, after declaring that disputes shall be referred to arbitration, adds a condition of forfeiture of a devise or bequest, in case the devisee or legatee should commence any proceedings at law or in equity relating to the testator's estate and effects, such condition is void, as uncertain and repugnant; since, if taken in its generality, it might prevent the devisee or legatee from taking any legal proceedings for the protection of his rights (*a*). **255.**

A limitation over, whether by deed or will, and whether in favour of an individual or of a lawful charitable use, in case of a gift previously made by the same deed or will for an individual or a charity being void, will be supported (*b*). **256.**

In the case of real property, and generally in the case of personal property, if a condition precedent is void, the interest which is to vest on the fulfilment thereof cannot

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Conditions  
as to arbi-  
tration.

Limitation  
over if pre-  
vious gift  
void.

Effect of  
the invali-  
dity of con-  
ditions.

(*a*) *Rhodes v. Muswell Hill Land Co.*, 29 Beav. 560. 5 Russ. 289; *Carter v. Green*, 3 K. & J. 591.

(*b*) *De Themmines v. De Bonnaval*,

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take effect (a). If a condition subsequent, or a conditional limitation, annexed to a grant, devise, or bequest of real or personal property, is void, as the estate or interest cannot be defeated by it, such estate or interest is absolute in the first instance, or afterwards becomes so (b). But if the condition of a bond is contrary to the moral law, the bond itself is void (c). **257.**

If the void condition is a mixed condition, the preceding estate, intended to be annihilated by it, is absolute in the first instance, or afterwards becomes so; and the estate to arise or be accelerated on the fulfilment of the condition cannot arise or be accelerated. If the condition is of that species which is termed a special or collateral limitation the effect is the same as if it were a proper condition subsequent (d). **258.**

(a) 2 Bl. Com. 156—7; Co. Litt. 206 a, b, 218 a; 1 Pres. Shep. T. 129, 132—3; 2 Cruise T. 13, c. 2, § 21; 1 Rop. Leg. by White, 754—7; 2 Jarm. Wills, 2nd ed. 8, 11.

(b) 2 Bl. Com. 156—7; 1 Pres. Shep. T. 129, 132, 133; Co. Litt. 206 a, b; 2 Cruise T. 13, c. 2, § 21; 1 Rop. Leg. by White, 783; 2 Jarm.

Wills, 2nd ed. 9; *Webster v. Parr.* 26 Beav. 236; *Re Catt's Trusts*, 2 Hem. & Mil. 46.

(c) 2 Pres. Shep. T. 372, n. 5; Co. Litt. 206 b.

(d) Smith's Executory Interests annexed to Fearn, § 700 a, 701: *Ware v. Carr*, 10 B. & C. 433. See *supra*, par. 154—171.



## CHAPTER VI.

THE PERIOD TO WHICH THE EVENT OF DEATH, WHEN MENTIONED IN CONDITIONAL LANGUAGE, AS IF IT WERE A CONTINGENT EVENT, IS TO BE REFERRED.

WHERE personal estate is bequeathed to a person indefinitely or absolutely, with a limitation over to another on the death of the first person, without expressly referring to any particular period, as the time of his decease, and his death is mentioned in terms applicable to a contingency, and not to a certain event, it becomes a question in what sense the expression as to his death is to be understood. The expression is either defective in not specifying the period to which the death is to be referred, if a contingency was meant, that is, if a death at any particular period was intended; or else it is incorrect in applying words of contingency to an inevitable event, if they refer to death generally, whenever it may happen (a). 259.

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Preliminary  
remarks.

And it will be perceived that whatever construction is put upon the words, the Court is involved in this difficulty—that either the expression of contingency referential to death must be translated into a different expression applicable to an event certain, or, if such expression is construed in its natural sense, words must be supplied to specify the period to which the death is to be referred, so as to satisfy the contingent import of the expression. 260.

These remarks will at once suggest to the draftsman, when he means to refer to death generally, to be careful

Practical  
caution.

(a) See remarks of Sir W. Grant, M. R., in *Cambridge v. Rous*, 8 Ves. 20, 21. But see contrary view of Lord Thurlow, in *Billings v. Sandom*, 1 B. C. C. 394, and Lord Loughborough, in *Lord Douglas v. Chalmer*,

2 Ves. Jun. 504 a. It would be well if all would deeply reflect that death is not an event which may happen to some and not to others, but that it is a *certainty to all*.

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not to speak of it in terms which are only applicable properly to a contingent event; and when he means to speak of death at a particular period, to be careful to specify that period. **261.**

Rules of  
construc-  
tion in the  
case of per-  
sonal estate.

But there are many cases in which this caution has not been observed. And in reference to these, certain rules may be laid down. **262.**

I. Let us consider the case of personal estate.

Indefinite  
or absolute  
gift to one,  
and "in  
case of his  
death," or  
"in the  
event of his  
death," to  
another.

1. Where personal estate is given to a person indefinitely or absolutely, "and in case of his death," or, "and in the event of his death," to another, there, both for the purpose of giving effect to the first indefinite or absolute or apparently absolute gift, as such, and in order to satisfy the contingent import of the words, the testator, in the absence (a) of all indications of a contrary intention, is not held to refer to death generally, whenever it may happen, but to a death at a particular period. **263.** And—

(1.) Where an immediate interest is given to the person whose death is so spoken of, and there is no other period to which the death can be referred, he is held to refer to the death of the prior taker in the lifetime of the testator; and the prior taker has the absolute interest, with an alternative limitation over, to take effect only in case of the death of the prior taker in the lifetime of the testator. **264.**

In some of the decided cases (b), there were special circumstances and considerations in aid of the construction described in this rule. But there have been other cases (c), in which there was no special circumstance, but the construction was governed simply by the contingent import of the expression referential to death. **265.**

(a) *Milner v. Milner*, 34 Beav. 276.

(b) *Hinckley v. Simmons*, 4 Ves. 160; *Cambridge v. Rous*, 8 Ves. 12; and *Arthur v. Hughes*, 12 Beav. 506.

(c) *Trotter v. Williams*, Pre. Ch.

78; 2 Eq. Cas. Ab. 344, pl. 2; *Slade v. Milner*, 4 Madd. 144; *Owmaney v. Bearan*, 18 Ves. 291; and *O'ryan v. Baines*, 7 Sim. 40; *Schesk v. Agner*, 4 K. & J. 405; *Bowers v. Bowers* L. R. 8 Eq. 283.

On the other hand, there have been cases in which, PART II.  
T. I, CH. 6. partly on special grounds, expressions referential to death as a contingent event, have been translated into expressions applicable to death viewed as a certainty, or in other words applicable to death generally : so that the prior taker has been restricted to a life interest, with a quasi remainder over on his death, whenever it might occur (a). **266.**

We have seen that one principle of the construction involved in the rules above laid down, is that of satisfying the contingent import of the expression used. But such a construction is also considerably aided by the policy of the law, which ought to lean in favour of the primary object of the testator's bounty, and also favours the absolute enjoyment and transfer of property, which the opposite construction greatly tends to prevent. It may, however, be only proper to make an exception from the operation of this last-mentioned principle, where the parties who are interested as prior and subsequent takers stand in the relation of parent and child ; for in some cases, there should be no leaning in favour of the parent and against the child, so as to incline to give the parent the absolute interest, and the child a mere substituted interest, in an uncertain event. Indeed, as to the first of these principles, the leaning in favour of the primary object, it may perhaps be more strict to say, that it has no application, in certain cases, to gifts to parent and child ; for they both stand on the same level in the mind of the testator, so far as this, that neither can be said to be more than the other the primary object, though it is of course only natural that the parent should take before the child. **267.**

It is important to observe that the circumstance of the testator having in a subsequent part of the will, or by a codicil expressly provided for the event of the death of a

(a) *Billings v. Sandom*, 1 B. C. C. 393 ; *Lord Douglas v. Chalmer*, 2 Ves Jun. 500.

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legatee in the testator's lifetime, was regarded by Lord Loughborough, in *Lord Douglas v. Chalmer*, as showing that where the testator had such an event in contemplation, he took care to express it; and that therefore where he did not express, he did not intend it. Whereas Sir J. Leach, in *Slade v. Milner*, considered that this circumstance only showed that the testatrix had contemplated the possibility that the legatees might die before her, so as to afford ground for supposing that such an event was in her contemplation, when she used the expression "and in case of her death." 268.

(2.) "Where there is a gift of a particular interest in the same property, antecedent to the gift to the person whose death is spoken of, the death, in the absence of all indications of a contrary intent, is construed to be a death in the lifetime of the first taker, whether subsequent or prior to the death of the testator, rather than a death in the lifetime of the testator simply" (a). 269.

(3.) And "where, indeed, the will furnishes any other period besides the death of the testator, to which the death of the legatee can be referred, it will be held, in the absence of indications of a contrary intent, to mean a death before such other period, rather than a death generally at some time or other, and rather than simply a death before the testator. The reason is, that it is more natural for a testator to provide against the death of a legatee before some event which may and probably will happen subsequent to his, the testator's, own decease, than for him simply to provide against the legatee dying before himself." 270.

Gift over  
"if he  
should die"  
"or in  
case he  
should die"  
"but in  
case he  
should die."

2. "Where the gift over is introduced by the words 'if he should die,' or by the words 'or in case,' or by the words 'but in case,' instead of the words 'and in case of his death,' the intention to refer to a death in the

(a) *Smith's Executory Interests* to *Norton v. Nelligan*, 1 B. C. C. annexed to *Fearne*, § 658, 661. As 492, see 8 Ves. 21.

testator's lifetime, or at some other particular period, instead of death generally, whenever it may happen, is still more clear" (a). 271.

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3. Where the prior taker is expressly restricted to a life interest, there, expressions referential to death will be understood as referring to death generally, whenever it may happen, although these expressions are such as to import contingency; for, as the prior taker's interest is to cease with his life, it does not curtail his interest to refer the expression to death generally. And that being the case, it is most natural to suppose that the testator would desire the subsequent taker to enjoy the property, whenever the prior taker's interest might cease, and not merely in the event of its ceasing by a death at a particular period. And as it is very common to use the contingent form of expression as synonymous for "at or on his decease," so the Court, in furtherance of the presumable intention of the testator, will construe those expressions accordingly. 272.

Prior gift  
for life  
only.

4. And where only the interest or income, and not the capital, is given to the prior taker, expressions referential to death will be understood as referring to death generally, whenever it may happen, although these expressions may be of contingent import; because the giving the interest or income only to the prior taker is an indication that he was only to take for life; and that the capital was to belong to the subsequent taker, subject only to such life interest of the prior taker (b). On the other hand, where payment is expressly directed to be made to the prior taker, this is an indication that he is to take the absolute interest, or, at all events, that the subsequent taker is not to take on the death of the prior taker, whenever it may

Prior gift of  
the income  
only.

(a) Smith's Executory Interests annexed to Fearn, § 658, 661. As to *Nowlan v. Nolligan*, 1 B. C. C.

482, see 8 Vcs. 21.

(b) 2 Jarm. Wills, 2nd ed. 633 *Tilson v. Tilson*, 1 R. & My. 553.

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happen, but only in case of his death in the testator's lifetime, or at some other particular period (a). 273.

II. Let us now consider the case of real estate.

Rules of  
construction  
in the  
case of real  
estate,  
devised  
before the  
stat. 1 Vict.  
c. 26.

1. It has been held that where an indefinite devise of real estate is made to a person by a will executed before the Wills Act, 1 Vict. c. 26, with a limitation over in case of his death, the limitation over will take effect on his death, whenever it may happen (b). As in the case of an indefinite devise of real estate before the Wills Act, the law constructively supplied the words for life, so as to restrict the interest given to the prior taker to an estate for life, such a case stood upon the same footing as a bequest of personalty to one expressly for life, followed by a limitation in the event of his death. In each case the duty of leaning in favour of the primary object of the testator's bounty, and of favouring the absolute enjoyment and transfer of property had no place, as whatever construction was put on the words of the limitation over, the prior taker could only take for life. 274.

Devise since  
that Act.

2. But where an indefinite devise of real estate is made to a person by a will executed since the Wills Act, there, in the absence of a contrary intention, such a devise would of itself give him a fee by virtue of the Act; and hence where such a devise is made, with a limitation over in case of his death, perhaps the same construction will be given to it as to a corresponding disposition of personal estate, since the same reasons apply to each case. 275.

Cases where  
reference is  
not to death  
simply.

The preceding remarks are confined to the case of words referring to death *simply*, as if it were a contingent event. But there are other litigated cases referring to death, not simply, but under specified circumstances; such as death without having attained a given age, or before the time of a legacy being payable, or without having a child. In

(a) *Webster v. Hale*, 8 Ves. 414;  
*Arthur v. Hughe* 4 Beav. 506.

(b) *Bones v. Scowcroft*, 3 Y. & C  
(Ex.) 640.

those cases, the association of the other specified circumstances with the event of death, was sufficient to justify the use of contingent expressions: for, although death simply is not a contingency, but an absolute certainty, yet death under specified circumstances may be a contingency. So that in order to satisfy the contingent import of the expressions, it was not necessary to consider the testator to be referring to death under the circumstances at any particular period; for his language would be correct if understood to refer to a dying under the circumstances at any period whatever. But still where no particular period has been mentioned as the period to which death under specified circumstances was intended to refer, the meaning of the testator has been considered to be ambiguous, and many cases have been brought before the Courts for the purpose of determining to what period the event of death under specified circumstances was to be referred (*a*). 276.

It is now settled, however, that where there is a gift over in the event of dying unmarried, or without children, or without issue (not meaning an indefinite failure of issue), that refers to a dying unmarried, or without children or issue, at any time, whether in the lifetime or after the death of a prior taker, unless a contrary intention appears in the will (*b*). 277.

(*a*) See 2 Jarm. Wills, 2nd ed. c. 49.

L. R. 7 H. L. 408; *Olivant v.*

(*b*) *O'Mahoney v. Burdett*, L. R.

*Wright*, L. R. 20 Eq. 220; 1 Ch.

7 H. L. 388; *Ingram v. Soutten*,

D. (Ap.) 346.

Cases where there is a reference to death, unmarried, or without children, or without issue.

## CHAPTER VII.

## OF CONDITIONS GENERALLY.

PART II.  
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To whom a  
condition  
may be  
reserved or  
granted.

At the common law, a condition, or the benefit of a condition, can only be reserved to the grantor, lessor, or assignor, and his real or personal representatives, according to the nature of his estate, and not to a stranger (a). But by the stat. 8 & 9 Vict. c. 106, s. 5, "under an indenture executed after the 1st of October, 1845," "the benefit of a condition respecting any lands or tenements may be taken, although the taker thereof be not named a party to the same indenture." 278.

Whether a  
condition  
may be  
created at a  
subsequent  
time.

In the case of an estate of freehold in land, a condition must be created and annexed to the estate at the time of the making of it, and not at any subsequent time. It may be created by a separate deed, but such deed must be sealed and delivered at the same time with the principal deed (b). But in the case of chattels or of things executory, such as rents, annuities, etc., a condition may be created at a subsequent time (c). 279.

Taking  
possession  
binds to  
performance  
of  
condition.

Where an estate is given upon condition, the taking possession of the land to which the condition is annexed binds to the performance of the condition, even though such performance should be attended with a loss (d). 280.

Condition as  
well as a  
covenant for  
the resump-  
tion of land  
by the  
lessor.

Where, after the covenants in a lease, there was a passage beginning with the words "Provided, nevertheless," and providing, that, in case the lessor should at any time

(a) 2 Cruise T. 13, c. 1, § 15; 1 Pres. Shep. T. 120, 149.

(b) 2 Cruise T. 13, c. 1, § 10; Co. Litt. 236 b, 237 a; 1 Pres. Shep. T. 126.

(c) 2 Cruise T. 13, c. 1, § 12; Co. Litt. 236 b, 237 a; 1 Pres. Shep. T. 126.

(d) 2 Cruise T. 13, c. 2, § 15.



be desirous of having any part of the land delivered up PART II.  
T. I, CH. 7. to him, and of such desire should give three months' notice, then, at the expiration of such notice, the lessee did thereby covenant to surrender up, and that the lessor should take possession of such part or parts of the land as should be mentioned in the notice, he, the lessor, paying a reasonable compensation for moneys laid out in improving the condition of the land so given up, and thenceforth the rent should be reduced in proportion to the land given up; it was held, that, under this proviso, the lessor might resume *all* the demised land, and that it operated as a condition as well as a covenant; so that the lessor might take possession without waiting for the lessee to give up possession; and that the lessor might do so without having first paid the compensation (a). **281.**

A condition, as distinguished from a conditional limitation, may abridge the subject of an estate, or it may determine the whole of the estate itself, but it cannot determine it for part of the time for which it was originally to endure, and leave it good for the residue, or determine the estate as to one person, and leave it good as to another (b). **282.**

Neglect to repair, not being an act done or caused to be done, but a mere omission to do an act, is not within a proviso in a lease giving power of re-entry, "if the lessee shall do, or cause to be done, any act, matter, or thing contrary to, or in breach of, any one or more of the covenants" (c). **283.**

But if a devise is made to a person for life, he keeping the house in repair, and he leaves it out of repair at his death, an action lies under the statute 3 & 4 Will. 4, Liability of executor of a devisee for life charged with repairs on neglect of devisee to repair.

(a) *Doe d. Gardner v. Kennard*, 202 b, n. 2.

12 A. & E. (N. S.) 244.

(c) *Doe d. Abdy v. Stevens*, 3

(b) See 2 Cruise T. 13, c. 1, § 13; B. & Ad. 299.

1 Pres. Shep. T. 121; Co. Litt.

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**T. I, CH. 7.**

c. 42, s. 2, against his executor by the immediate reversioner in respect of repairs not done by the deceased within six months before his death (a). **283a.**

**Release of a condition.**

**Stipulations not of the essence of contracts.**

**Stat. 36 & 37 Vict. c. 66, s. 25 (7). The Supreme Court of Judicature Act, 1873.**

A condition may be extinguished by a release (b). **284.**  
[It is enacted by stat. 36 & 37 Vict. c. 66, s. 25 (7), that “ stipulations in contracts, as to time or otherwise, which would not, before the passing of this Act, have been deemed to be or have become of the essence of such contracts in a Court of Equity, shall receive in all Courts the same construction and effect as they would have heretofore received in equity.”] **284a.**

(a) *Woundhouse v. Walker*, L. R. 5 Q. B. D. 404.

(b) 2 Cruise T. 13, c. 2, § 59.

## TITLE II.

### OF FREEHOLD, AS DISTINGUISHED FROM COPYHOLD INTERESTS.

ALL the landed property of the kingdom is supposed to be granted by, and *holden* of, some superior lord, in consideration of certain services to be rendered to him by the possessor of such property. The thing holden is therefore styled a *tenement*, the possessors thereof *tenants*, and the manner of their possession a *tenure*. And all the land in the kingdom is supposed to be holden of the Sovereign, who is styled the lord *paramount*, or above all. But it is frequently held, or supposed to be held, immediately of the tenants of the Crown, and only mediately, through them, of the Crown; for the King's tenants frequently granted out portions of their lands to other persons, and thereby became also lords with respect to those other persons, as they themselves were still tenants with respect to the King, and thus, partaking of a middle nature, were called *mesne* or middle lords (a). **285.**

PART II.  
TITLE 2.

Tenure  
explained.

Things real are either of freehold or of copyhold tenure. Things real of freehold tenure are those hereditaments which are capable of being conveyed and assured by, and are held under, the ordinary deeds of conveyance and assurance (b). **286.**

Freehold  
and copy-  
hold.

Definition  
of things  
real of free-  
hold tenure.

Hereditaments of freehold tenure, which are usually called freeholds, are, 1. Of common or ordinary socage tenure, which is the tenure whereby the generality of freeholds are held. 2. Of gavelkind tenure, which prevails in the county of Kent, and also exists in some other

Different  
kinds of  
freehold  
tenures.

Common  
socage.  
Gavelkind.

(a) 2 Bl. Com. 59.

(b) 2 Bl. Com. 100, 101.

**PART II.**  
**TITLE 2.**  
**Burgage.**  
**Grand**  
**serjeanty.**

parts of the kingdom. 3. Of burgage tenure, by which houses, or lands which were formerly the site of houses, in some ancient boroughs, are held. 4. Of grand serjeanty tenure, whereby lands are holden of the Crown in consideration of rendering to the Sovereign some personal service. 5. Of petit serjeanty tenure, whereby lands are holden of the Crown in consideration of rendering to the Sovereign some small implement of war. 6. Of frankalmoign tenure, a spiritual tenure by which the religious houses were held, and by which the parochial clergy, together with many ecclesiastical corporations, now hold their lands (a). **287.**

**Services.**

The characteristic of all these tenures, except the last, is the rendering of services which are both honourable and certain; and on this account they are all included in the general term of socage tenure, which signifies a tenure by services of an honourable and definite kind, and sometimes, though improperly, in the term free and common socage tenure, as opposed to other tenures in which the services were either menial or uncertain (b). **288.**

**Tenure of**  
**allotments.**

The tenure of an allotment under an Inclosure Act, in the absence of any provision to the contrary in the Act, is always common socage tenure, whatever may be the tenure of the commoner's estate (c). **289.**

**Rents.**  
**Relief.**

One of the most usual kinds of services is a rent; and wherever lands in fee simple are held by a rent, there is due to the lord, on the death of a tenant, one year's rent, which is called a relief, and is one of the incidents to socage tenure (d). **290.**

(a) 2 Bl. Com. 6; 1 Cruise D. 75; Burton, § 1258, n.; *Paine Prelim. Diss.* c. 3. *Ryder*, 24 Beav. 151.  
(b) 2 Bl. Com. 79, 81. (d) 2 Bl. Com. 86, 87.  
(c) 1 Jarm. & Byth. by Sweet,

## TITLE III.

### OF COPYHOLD INTERESTS.

#### CHAPTER I.

##### OF COPYHOLDS GENERALLY.

THINGS real of copyhold tenure, or copyholds, are hereditaments which are parcel of the demesnes of a manor, and are incapable of being legally conveyed by, or held under, the ordinary deeds of conveyance, and only capable of becoming vested at law in any person by an admittance of such person as tenant by the lord of the manor, grounded on a surrender made to the lord for that purpose by the former owner, followed by a grant by the lord, or on a voluntary grant by the lord, or, in some cases of free copyholds, on a deed of bargain and sale by the former owner, and are held by copy of court roll, that is, by a copy of the entry, made on the court rolls of the manor, of such surrender, grant, or deed, and admittance (*a*). 291.

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Things real  
of copyhold  
tenure  
defined.

It is necessary to the existence of a copyhold that the hereditaments should have been demised or demisable by copy from time immemorial (*b*). But if there has been no interruption in the custom of demising by copy, the capacity of being granted according to the custom may remain dormant for any length of time (*c*). 292.

Heredita-  
ments  
immemori-  
ally demis-  
able by  
copy.

(*a*) 2 Bl. Com. 100, 101, 370; 1 Cruise T. 10, c. 1, § 3, 5, 29, and T. 37, c. 1, § 4; Burton, § 1261, 1283, 1341, 1348.

(*b*) 1 Cruise T. 10, c. 1, § 24, and c. 6, § 21; Co. Litt. 58 b.

(*c*) Burton, § 1345; Co. Litt.

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Hereditaments of copyhold tenure are—

1. Ordinary copyholds.
2. Free copyholds or customary freeholds.

Ancient demesne.

Hereditaments of copyhold tenure are of two kinds : 1. Ordinary copyholds, which formerly were held, and are still expressed to be held, at the will of the lord of the manor, according to the custom of the manor, by copy of court roll. 2. Free copyholds or customary freeholds, which are not held or expressed to be held at the will of the lord of the manor, but only according to the custom of the manor, by copy of court roll. To this last species belongs what is termed ancient demesne, which consists of lands held of manors that were formerly in the possession of the Crown (*a*). **293.**

Original and present condition of copyholds, as regards the will of the lord.

Copyhold estates were originally nothing better than mere estates at will. But, although still expressed to be held at the will of the lord, yet as the kindness and indulgence of successive lords permitted these estates to be enjoyed by the tenants according to particular customs established in their respective districts, the will of the lord ceased to be arbitrary, and became fixed and ascertained by the particular custom which had prevailed (*b*). So that, in general, copyholders may have estates of the same duration and certainty as freeholders. **294.**

Copyhold customs are general,

and particular.

There are two sorts of copyhold customs : 1. General customs, extending to all manors in which there are copyholders, and warranted by the common law ; of which the Courts take notice without being specially pleaded. 2. Particular customs, prevailing in some manors only, which must be specially pleaded. These are construed strictly, and where they are contrary to reason, morality, or justice, or not capable of being reduced to a certainty, the Courts will not pay any attention to them (*c*). **295.**

Evidence of customs.

A regular series of entries on the court rolls is sufficient

(*a*) See 2 Bl. Com. ch. 6 ; 1 Cruise D. Prelim. Diss. c. 3, § 34, 60, and T. 10, c. 1, § 2, 3 ; Burton, § 1283 ; Co. Litt. 59 b, n. 1.

(*b*) 2 Bl. Com. 147.

(*c*) 1 Cruise T. 10, c. 1, § 43 ; Co. Litt. 62 a.

evidence of the customs of a manor; and so also is an ancient writing handed down with the court rolls from steward to steward, purporting to be a customary of a manor (a). **296.**

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The freehold of the whole manor is always in the lord only (b). So that, even in the case of customary freeholds, whatever privileges may be annexed to them, the true freehold interest in the land is always vested in the lord; and though in some instances a deed of bargain and sale is employed, instead of a surrender, for transferring the customary estate, yet as the assurance is imperfect without an admittance in the lord's court, they are properly said to be of copyhold tenure (c); and, subject to the estates in them which the custom confers, all lands to which copyhold customs relate, are held by the lord under the common law as part of the demesnes of his manor (d). **297.**

Freehold is  
in the lord.

Where a testator devises copyholds, to such uses as A. and B., or the survivor of them, his executors or administrators, shall appoint, and, subject thereto, to the use of A. and B., their heirs and assigns, upon certain trusts, and he directs his trustees to sell the copyholds, the trustees can make a good title to a purchaser without being admitted: for a testator, disposing of a copyhold by his will, does no more than designate the person whom the lord shall admit, and whether he fixes on a person by name, or, by means of a power of appointment, authorises another to name him, who accordingly does name him by exercising such power, the result is the same. And it is immaterial whether there is any gift to the trustees for sale in default of or until appointment, or not. In the latter case, the

Where  
admittance  
of trustees  
of copyholds  
not neces-  
sary.

(a) 1 Cruise T. 10, c. 1, § 45.

(b) 2 Bl. Com. 148.

(c) Burton, § 1261, 1283; *Duke of Portland v. Hill*, L. R. 2 Eq. 765.

(d) Burton, § 1259. See *Eardley*

*v. Granville*, L. R. 3 Ch. D. 826, as to the right of the lord and the copyholders to trees, mines, and minerals.

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bargain and sale which operates as an exercise of the power, defeats the title of the heir; in the former case, it defeats the title of the devisees (a). 298.

Where a copyhold is devised to trustees for a term of years, and subject thereto to a person in fee, and he is admitted, not to an estate in remainder, but to an estate in præsentia in fee, and pays a full fine, the trustees need not be admitted, as the lord has both a tenant on the roll and a full fine (b). 299.

What may  
be granted  
by copy of  
court roll.

All lands and tenements within a manor, and whatever concerns lands or tenements, provided it is a permanent thing lying in tenure, or appendant to something that lies in tenure, may be granted by copy (c). Thus, the herbage, or vesture, or underwood growing upon a part of the manor, may be granted by copy (d); as also an advowson, common, or fair, which are appendant (e). And even a manor itself may be granted by copy, and the customary lord may hold courts and grant copies (f). 300.

Ownership  
of waste  
land by the  
side of a  
road or  
river.

It may here be observed, that spirit of waste land on the side of an ancient highway, or of a river, are, together with the soil to the centre of the road or bed of the river, presumed to belong to the owner of the adjoining inclosed land. But the presumption may be rebutted by evidence of acts of ownership on the part of the lord of the manor or other evidence. And if it is probable that the lands were inclosed from the waste subsequently to the formation of the road, or if the strips of land communicate with open commons or larger portions of land, the presumption is in favour of their belonging to such waste or commons or larger portions of land. And the presumption

(a) *Glass v. Richardson*, 2 D. M. & G. 662.

(b) *Eeringham v. Iratt*, L. R. 7 Q. B. 683.

(c) 1 Cruise T. 10, c. 1, § 36, 41; Co. Litt. 58 b.

(d) 1 Cruise T. 10, c. 1, § 36—7; Co. Litt. 58 b; Burton, § 1259.

(e) 1 Cruise T. 10, c. 1, § 41; Co. Litt. 58 b.

(f) 1 Cruise T. 10, c. 21, § 38; Co. Litt. 58 b.



of their belonging to the owner of the adjoining inclosures does not arise in respect of roads set out under modern Inclosure Acts (a). **301.**

A particular custom is necessary to make original grants of portions of the waste, to be held for the first time by a copyhold tenure (b). Nor will a custom be allowed by which all parts of the waste might be granted, without limit or restriction, where that would tend to deprive the copyholders of a right of common (c). **302.**

Copyholds may be granted for life or lives ; and, in many manors, the custom is to grant copyholds for one, two, or three lives. In some of those manors, the custom gives the copyholder a right to a renewal of the grant on the falling of the lives, from which they are called tenant-right estates (d). A custom of granting to two or three persons for term of their lives and the life of the survivor, authorises a grant to one for the lives of himself and two other persons not named to take any interest (e). And where copyholds are granted for life, the person who pays the fine takes the beneficial interest, and the others named in the grant are only trustees for him (f). **303.**

The lord may become absolutely entitled to a customary tenement of inheritance, by forfeiture, by escheat, by the expiration of a customary estate not of inheritance, or by a surrender made to his own use. And in these cases the lord may either retain the tenement in his own hands, or he may make a new grant thereof (g). If the lord retains the tenement in his own hands, it will pass by or become

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Granting portions of the waste.

Granting for lives.

Lord may become entitled to a customary tenement.

In such case he may either retain or re-grant it.

Consequence of retaining it.

(a) 1 Jarm. & Byth. by Sweet, 79; Burton, §1046; Sugd. Concise View, 273—4; *Gery v. Redman*, L. R. 1 Q. B. D. 161.

(b) Burton, § 1348 ; 1 Cruise T. 10, c. 1, § 29, 30.

(c) Burton, § 1349 ; *Badger v.*

*Ford*, 3 Bar. & Ald. 153.

(d) 1 Cruise T. 10, c. 2, § 23.

(e) See 1 Cruise T. 10, c. 2, § 38.

(f) 1 Cruise T. 10, c. 2, § 23.

(g) 2 Bl. Com. 370 ; Burton, § 1341 ; 1 Cruise T. 10, c. 6, § 20, and c. 2, § 29.

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subject to any settlement, mortgage, conveyance, or devise of the manor, as parcel thereof, though made before the time when the lord became entitled to it (*a*). **304.**

Persons who  
may  
re-grant.

All those who have any estate in a manor, though it be only for years, or even at will, or defeasible by a condition, may re-grant a copyhold which escheats or comes to them in any other way. And such grant will bind the lord who has the inheritance of the manor ; for each of those persons is dominus pro tempore, and within the custom (*b*). And for this reason, even an infant, a person of unsound mind, an outlaw, or an excommunicate, is capable of making voluntary grants of copyholds (*c*). And so a steward of a manor may make voluntary grants ; for he represents the lord to all intents (*d*). And if a lord of a manor devises that his executor shall grant copyholds according to the custom of the manor for payment of his debts, the executor, though he has no estate in the manor, may make grants accordingly (*e*). But, with these exceptions, persons not having a lawful estate in a manor, cannot make voluntary grants. Thus it is settled, that tenants at sufferance, disseisors, abators, or intruders, cannot bind the lawful owners of a manor by their grants of copyholds (*f*). **305.**

Custom  
must be ob-  
served on a  
re-grant.

When the lord grants a new estate by copy, since it is an estate against common right, and warranted only by the custom, that must be strictly pursued to bind the heir (*g*). A custom, however, enabling the lord to grant greater estates will also enable him to grant less estates, but not vice versâ (*h*). **306.**

(*a*) 1 Cruise T. 10, c. 6, § 5—7; 6 Cruise T. 38, c. 3, § 40, 41.

(*b*) 1 Cruise T. 10, c. 2, § 3; Burton, § 1347; Co. Litt. 58 b.

(*c*) 1 Cruise T. 10, c. 2, § 10; Burton, § 1347.

(*d*) 1 Cruise T. 10, c. 2, § 14.

(*e*) Co. Litt. 58 b; 1 Cruise T. 10, c. 2, § 9.

(*f*) 1 Cruise T. 10, c. 2, § 12.

(*g*) 1 Cruise T. 10, c. 2, § 30; Burton, § 1436.

(*h*) 1 Cruise T. 10, c. 2, § 32; Burton, § 1436; 2 Bl. Com. 370.

Copyhold grants derive their effect from the custom of the manor, and not from the estate of the lord ; and hence the tenant is subject to no charges or incumbrances of the lord (a). **307.**

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—  
Copyhold grants do not derive their effect from the lord's estate.  
Application of statutes to copyholds

No statute in which lands or tenements of a customary tenure are not expressly mentioned, shall be applied to customary estates, if such application would be derogatory to the customary rights of the lord or tenant (b). **308.**

(a) 1 Cruise T. 10, c. 2, § 39 ; 2 Bl. Com. 370.

(b) Burton, § 1286 ; 1 Cruise T. 10, c. 3, § 54.

## CHAPTER II.

OF THE EXTINCTION OF MANORS, MANORIAL RIGHTS,  
AND COPYHOLDS, AT THE COMMON LAW.PART II.  
T. 3, CH. 2.Extinction  
of copy-  
holds.1. By sur-  
render or  
release to  
the lord.2. By con-  
veyance or  
demise by  
the lord to  
the tenant  
for a  
particular  
estate.3. By de-  
mise to a  
stranger,  
and assign-  
ment by  
him to the  
tenant.4. By en-  
franchise-  
ment.What estate  
the lord  
must have.Who may  
take an

1. If a copyholder surrenders his estate to the lord, to the use of the lord, or without declaring any use (*a*), or releases all his estate and interest to the lord, it will operate as an extinguishment of his copyhold (*b*). 309.

2. Any conveyance of the land by the lord to the copyholder for an estate of freehold, or even for a term of years, will extinguish the copyhold. For the estate of the copyholder, being only at will, becomes merged by the accession of any greater estate (*c*). 310.

3. Upon the same principle, if the lord demises land held by copy to a stranger for years, and the stranger assigns over his term to the copyholder, the copyhold is thereby extinguished (*d*). 311.

4. The next mode of extinguishing a copyhold is by enfranchisement, by which the tenure is changed from base to free. This may be done by the lord's releasing to the copyholder his seignorial rights and services (*e*), or by his making a conveyance to the tenant in fee simple (*f*). 312.

The lord of a manor, who enfranchises a copyhold, must either be seised in fee simple, or have a power to convey the fee simple of the lands to the copyholder (*g*). But

(*a*) 1 Cruise T. 10, c. 6, § 2, 4.

(*b*) 1 Cruise T. 10, c. 6, § 8.

(*c*) 1 Cruise T. 10, c. 6, § 10;  
Burton, § 1351.

(*d*) 1 Cruise T. 10, c. 6, § 11.

(*e*) 1 Cruise T. 10, c. 6, § 13; 9  
Jarm. & Byth. by Sweet, 573.

(*f*) Burton, § 1351; 9 Jarm. &  
Byth. by Sweet, 573.

(*g*) 1 Cruise T. 10, c. 6, § 18.

although a copyholder have a particular estate only in his copyhold, yet he may take an enfranchisement, which will be deemed absolute. But a Court of Equity will direct a conveyance from the heirs at law of the particular tenant to the persons in remainder, on their paying a proportionate part of the consideration given for the enfranchisement (a). **313.**

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enfranchisement.

5. If lands formerly granted by copy, instead of being re-granted by copy, are conveyed by an ordinary assurance for life or years by the lord, when he is seised of the manor in fee simple, this will destroy the custom of granting them by copy (b), unless they are included in the conveyance of the manor of which they are parcel (c). But if a person who is only tenant in tail or for life or for years of a manor, conveys by an ordinary assurance lands formerly granted by copy, though as to himself the custom of granting by copy is thereby destroyed, yet, as to the issue in tail or the reversioner, the custom is not destroyed. So it is in the case of a husband seised in right of his wife (d). **314.**

5. By conveyance, instead of re-grant.

6. A person cannot be both lord and tenant of the same lands. And therefore if he purchases, and is admitted to, lands held of the manor of which he is lord, the copyhold interest therein is immediately merged in his freehold estate as lord, and extinguished. And for the same reason, if there are several lords of a manor as tenants in common, and one of them, having a moiety of the manor, purchases, and, with the concurrence of the other lords, is admitted to lands holden of the manor, his copyhold interest in the lands, as to a moiety thereof, is extinguished (e). **315.**

6. By the lord purchasing and being admitted to lands held of his manor.

(a) 1 Cruise T. 10, c. 6, § 19; 9 Jarm. & Byth. by Sweet, 573.

(b) 1 Cruise T. 10, c. 1, § 31, 35; Burton, § 1344; *Ex parte Lord Henley*, 29 Beav. 311.

(c) 1 Cruise T. 10, c. 1, § 38, 34.

(d) 1 Cruise T. 10, c. 1, § 35; Burton, § 1344; *Ex parte Lord Henley*, 29 Beav. 311.

(e) *Cattley v. Arnold*, 4 K. & J. 595.

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7. By an  
extent, or an  
assignment  
for dower.

Extinction  
of the manor  
itself.

7. If lands formerly granted by copy are extended upon a statute or recognizance acknowledged by the lord, or are assigned to the lord's wife for dower, the lands can never afterwards be granted by copy (*a*). **316.**

If all the freeholds get into the hands of one freeholder, the manor is suspended for the time; and if the demesnes are severed from the services, or if the services become extinct, the manor, as a strict legal manor, is extinguished, and it becomes a manor in reputation only. The extinction of the manor, however, does not affect the powers or rights of the lord and customary tenants (*b*). **317.**

(*a*) 1 Cruise T. 10, c. 1, § 32.

(*b*) 9 Jarm. & Byth. by Sweet,

191 (*c*); 1 Cruise T. 10, c. 1.

§ 11.

## CHAPTER III.

OF THE COMMUTATION OF MANORIAL RIGHTS, AND THE  
ENFRANCHISEMENT OF COPYHOLDS UNDER THE STATUTES  
RELATING THERETO.

By the stat. 4 & 5 Vict. c. 35 (see in particular ss. 13, 14, 15, 23, 36, 52, 54), the rights of the lord may be voluntarily commuted for a rent charge and a small fine, or for a fine alone. **318.**

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Stat. 4 & 5  
Vict. c. 35.  
Voluntary  
commutation  
of  
manorial  
rights.

Voluntary  
enfranchise-  
ment.

Lands  
subject to  
the same  
title.

By ss. 56, 57, voluntary enfranchisements may be made in manner therein mentioned. **319.**

By s. 64, the title to enfranchised land shall not be affected by the enfranchisement: "All lands which shall be enfranchised under this Act shall be deemed to be held under the same title as that under which the same were held at the time of such enfranchisement, and shall not be subject to any estates, rights, titles, interests, incumbrances, claims, or demands affecting the manor of which the same were holden." **320.**

By s. 68, the costs of tenants may in certain cases be charged on the lands; and by s. 69, the costs of the lord may in certain cases be charged on the manors. **321.**

Charge of  
expenses.

By ss. 70—72, the enfranchisement consideration shall be a charge on the lands of the nature of a mortgage in fee; and it shall have priority over all other incumbrances except the tithe rent charge, either in favour of the lord or of any person who shall advance the money as a mortgagee. **322.**

Enfran-  
chisement  
considera-  
tion a  
charge on  
the land.

By s. 79, in the case of a commutation of manorial rights, the tenure and mode of conveyance shall not be affected thereby; and the lands shall be subject to the

Comer of  
customs as  
to descent,  
dower, free-  
bench, and  
curtesy, in

PART II.  
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case of a  
commuta-  
tion.

general law as to descent, dower, and curtesy, except as regards persons married at the time, and the rights of any husband or widow of a tenant of a manor at the time, saving the custom of gavelkind in Kent.

“ From and after the final confirmation of the apportionment, in the case of any commutation under this Act, or upon the execution of the deed whereby any voluntary commutation may have been effected, the several lands included in such commutation shall be held by copy of court roll, and shall be conveyed by surrender and admittance, in all cases in which the same shall have been previously so held and conveyed respectively, and in all other cases shall be held and conveyed in such manner as the same are now by custom held and conveyed, and shall continue parcel of the same manors as such lands would have been held of if such commutation had not taken place, but the same lands shall thenceforth cease to be subject to the customs of borough English or gavelkind, or to any other customary mode of descent, or to any custom relating to dower or freebench or tenancy by the curtesy of England; and all the laws relating to descents, or to estates of dower, or estates by the curtesy of England, which shall for the time being affect and be applicable to lands held in free and common socage, shall thenceforth affect and be applicable to the lands included in every such commutation: provided always that nothing herein contained as to curtesy or dower or freebench shall extend or be applicable to the case of any husband or widow who shall have been or shall be married before the final confirmation of the commutation apportionment, or the execution of such deed as aforesaid, or to alter or lessen, or in any way affect, any right which the husband or widow of any person who shall be tenant of a manor at the time of the confirmation of the said apportionment would or might have had if such commutation had not been made.”



But by s. 80, the custom of gavelkind in Kent is saved. **323.** PART II.  
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By s. 81, "In the case of any enfranchisement under this Act, from and after the final confirmation of the apportionment, or the execution of the conveyance (as the case may be), the several lands therein respectively comprised and enfranchised shall become and be in all respects of freehold tenure, but subject to the payment of the enfranchisement consideration in favour of the lords and steward or other officer as aforesaid; and all mortgages affecting the same shall be deemed and become mortgages of the freehold of the same lands for a corresponding estate, if such enfranchisement consideration shall be paid off, and if not so paid off, mortgages of the equity of redemption thereof, subject to such mortgage interest as aforesaid for securing such consideration: provided always, that nothing herein contained shall operate to deprive any tenant of any commonable right to which he may be entitled in respect of such lands, but such right shall continue attached thereto notwithstanding the same shall become freehold: provided also, that no such enfranchisement or conversion into freehold shall affect, except as aforesaid, any mortgage, or defeat the beneficial limitations of any will or settlement theretofore executed, or alter the descent or distribution of any estate or interest in land on the decease of any tenant or person entitled thereto in possession or remainder at the time of such enfranchisement or conversion." **324.** Effect of  
enfranchise-  
ment.

By s. 82, "No commutation under this Act shall operate to affect any rights of lords of manors to escheats, fairs, markets, appointments, franchises, royalties, rights, liberties, and privileges of chase and free warren, hunting, hawking, fowling, and of chasing and killing game and beasts of chase and free warren, and all ancient piscaries, fisheries, and rights of fishing, or any rights in any mines and What rights  
are not af-  
fected by  
commuta-  
tion.

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minerals or quarries within or under the said lands and hereditaments, or any other manorial rights whatever, unless expressly commuted under this Act." **325.**

Stat. 6 &  
V. c. 23.

This Act is explained and amended by the stat. 6 & 7 Vict. c. 23 ; by ss. 1—3 of which an enfranchisement under the stat. 4 & 5 Vict. c. 35 may be made in consideration of annual rent out of the lands enfranchised ; and any commutation or enfranchisement made under the same statute may be made in consideration of a conveyance of lands within the same manor, to or upon the uses and trusts to or upon which such manor is subject or held, or of any right to mines or minerals under such lands, or of any right to waste in such lands. And by s. 6, such rents shall have priority over all incumbrances except a tithe rent charge. **326.**

Commuta-  
tion or en-  
franchise-  
ment in con-  
sideration of  
an annual  
rent, or of a  
conveyance  
or of a right  
to mines or  
minerals,  
or waste.

Stat. 7 & 8  
V. c. 55—as  
to lands,  
mines, or  
minerals,  
the con-  
sideration of  
a commuta-  
tion or en-  
franchise-  
ment.

The stat. 4 & 5 Vict. c. 35 is further amended and explained by the stat. 7 & 8 Vict. c. 55 ; by s. 5 of which the lands, or mines, or minerals conveyed as a consideration of a commutation or enfranchisement need not be parcel of or under lands within the same manor as the lands which are the subject of the commutation or enfranchisement. **327.**

Stat. 15 & 16  
V. c. 51.  
Compulsory  
enfranchise-  
ment.

By the stat. 15 & 16 Vict. c. 51 ("The Copyhold Act, 1852"), s. 1, the lord or the tenant, after the next admittance, on or after the 1st of July, 1853, may "compel enfranchisement in manner hereinafter mentioned of the lands to which there shall have been such admittance as aforesaid ; provided that no such tenant shall be entitled to require such enfranchisement until after payment or tender of the fine or fines, and of the fees consequent on such admittance : provided also, that if from any cause such enfranchisement shall not take place until some event shall have happened which may require a second or any subsequent admittance, such second or subsequent admittance shall be made, with all the rights incident thereto, as

if this Act had not passed ; and it shall be competent for the lord or tenant to require and compel enfranchisement upon or after such second or subsequent admittance in the manner hereby provided for enfranchisement upon the next admittance." **328.**

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By the stat. 21 & 22 Vict. c. 94, s. 6, "Notwithstanding the first section of 'The Copyhold Act, 1852,' it shall be lawful, from and after the passing of this Act, for any tenant or lord of any copyhold lands to which the last admittance shall have taken place before the 1st of July, 1853, or of any freehold or customary freehold lands in respect of which the last heriot shall have become due or payable before the 1st of July, 1853, to require and compel enfranchisement of the said lands in the manner herein and in the said Act mentioned : provided always, that no such tenant shall be entitled to require such enfranchisement until after payment or tender (in the case of copyhold lands) of such a fine, and of the value of such a heriot, and in the case of freehold and customary freehold lands, of the value of such a heriot as would become due or payable in the event of admittance or death subsequent to the 1st of July, 1853, and also, in the case both of copyhold and of freehold or customary freehold lands, of two-thirds of such a sum as the steward would have been entitled to for fees in respect of such admittance or heriot." **329.**

By the stat. 15 & 16 Vict. c. 51, s. 7, "Where such enfranchisement shall have been effected at the instance of the tenant, the compensation shall be a gross sum of money to be paid at the time of the completion of the enfranchisement ; or, in cases where the compensation exceeds £20, the same,—if the said commissioner shall so direct, and if all persons (if any) who shall have any mortgage, charge, or incumbrance affecting the lands enfranchised, and which shall have been in existence at the time of the passing of this Act, shall consent thereto,—may remain as a first

Compensation by gross sum paid, or charge, or rent charge or conveyance of land.

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charge, under the provisions of this Act, on the lands enfranchised, until the expiration of such time, from the day of such completion, as the said commissioners shall appoint, but not exceeding in any case ten years; and interest at the rate of £4 per centum per annum shall be payable thereon, or on such part thereof as shall from time to time remain unpaid, from the time of such completion as aforesaid, half-yearly, until full payment thereof; and where such enfranchisement shall have been effected at the instance of the lord, the compensation shall be an annual rent charge to be issuing out of the lands enfranchised: provided always, that the parties to any enfranchisement under this Act may in any case, with the sanction of the commissioners, agree that the compensation shall be either a gross sum of money to be paid or charged as aforesaid, or a yearly rent charge, or a conveyance of land to be settled to the same uses as the manor of which the enfranchised lands are holden is settled, as provided in the said recited Acts with respect to enfranchisements effected by virtue thereof; and, in every case, the valuer shall frame an award showing the amount, nature, and particulars of the compensation, which shall be in full satisfaction of all manorial rights whatsoever, save as hereinafter mentioned." And by s. 9, this award is to be confirmed by the copyhold commissioners (a), and registered at their office, and a copy entered on the court rolls. 330.

Priority of  
charge.

By s. 10, "Any charge under this Act shall be a first charge on such lands, and shall have priority over all mortgages, charges, and incumbrances whatsoever affecting such land (except tithe commutation rent charges, and any charges or rent charges which may have been or shall be charged upon the same lands for the drainage thereof by virtue of any of the statutes in that behalf), notwithstanding

(a) Now styled Land Commissioners by virtue of Stat. 45 & 46 Vict. c. 38, s. 48, in Appendix.

ing the actual priority in point of date or anterior title of such mortgages, charges, and incumbrances : provided always, that, notwithstanding any such charge, any moneys already invested, or any moneys previously secured or charged thereon, may be continued on the security of the same, notwithstanding the imposition of the said charge under this Act : provided also, that no such charge shall have priority over any mortgage, charge, or incumbrance, which at the time of the passing of this Act may affect the lands enfranchised, without the consent of the persons entitled to such mortgage, charge, or incumbrance.” 331.

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T. 8, CH. 3.

By s. 11, it was provided that an enfranchisement of lands should be by deed. But by the stat. 21 & 22 Vict. c. 94, s. 10, this section is repealed, and a confirmed award of enfranchisement is substituted for a deed. 332.

Deed of enfranchisement.  
Award of enfranchisement.

By s. 12 of the stat. 15 & 16 Vict. c. 51, “ Every charge under this Act shall be made by a certificate under the hands and seal of the commissioners, to be called a certificate of charge ; and such certificate shall specify the whole amount of principal money to be charged on the lands, enfranchised under the powers of this Act, subject to which the land is enfranchised, and may specify any place, to be agreed upon between the parties, as the place of payment of the principal money and interest charged by such certificate ; and, if the parties so agree, or the said commissioners shall so direct as aforesaid, such certificate may provide that such principal money, or any part or parts thereof, shall continue upon the security of such certificate for any term or terms of years, period or periods, in such certificate mentioned, not exceeding ten years, and the lands charged thereby may be described by reference to the enfranchisement thereof under the said Acts, or otherwise, as the commissioners may think fit ; and such certificate may be in the form set forth in the schedule to this Act, or in such other form as the parties, with the consent of the commis-

Certificate of charge.

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T. 3, CH. 3.

capacity, with the consent of the husband, guardian, committee, or trustee of such person so under disability, to sell and transfer such rent charge, the payment for which shall be made in manner hereinafter mentioned." 339.

Redemption  
of rent  
charge.

By ss. 37, 38, a rent charge may be redeemed as therein mentioned (a). 340.

Common-  
able rights.

By s. 45, "Nothing herein contained shall operate to deprive any tenant of any commonable right to which he may be entitled in respect of such land; but such right shall continue attached thereto, notwithstanding the same shall have become freehold." 341.

What rights  
not affected  
by the Act.

By s. 48, "No enfranchisement under this Act shall extend to or affect the estate or rights of any lord or tenant in or to any mines, minerals, limestone, lime, clay, stone, gravel, pits, or quarries within or under the lands enfranchised, or within or under any other lands, or any rights of entry, rights of way and search, or other easements of any lord or tenant in, upon, through, over, or under any lands, or any powers which, in respect of property in the soil, might but for such enfranchisement have been exercised, for the purpose of enabling the said lord or tenant, their or his agents, workmen or assigns, more effectually to search for, win, and work any mines, minerals, pits, or quarries, or to remove and carry away any minerals, limestone, lime, stones, clay, gravel, or other substances had or gotten therefrom, or the rights, franchises, royalties, or privileges of any lord in respect of any fairs, markets, rights of chase or warren, piscaries, or other rights of hunting, shooting, fishing, fowling, or otherwise taking game, fish, or fowl, unless with the express consent in writing of such lord or tenant; and nothing in this Act shall be held or construed to extend to any copyhold lands held for a life or lives, or for years, where the tenant thereof hath not a right of renewal." 342.

(a) And see *supra*, par. 86 b.

By s. 53, "This Act shall be taken and construed as part of the first recited Act (4 & 5 Vict. c. 35), and the Acts amending and explaining the same ; and all the enactments therein contained as to enfranchisements effected under the provisions thereof shall be deemed and taken to apply to enfranchisements under this Act, and to the rights of all parties thereto, as if such enactments were here again repeated, except so far as is hereinbefore otherwise provided for ; and all enfranchisements which may have taken place under such Acts or any of them, and all matters and things incident thereto, shall be of the same force, validity, and effect as if the provisions of this Act had been contained in the said first recited Act." **343.**

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This Act to  
be deemed  
part of  
recited  
Acts.

By the stat. 16 & 17 Vict. c. 57, some further enactments are made as to the enfranchisement of copyholds, which it is not within the scope of this work to particularise. That Act is repealed by the stat. 21 & 22 Vict. c. 94. **344.**

Stat. 16 & 17  
V. c. 57.

By the stat. 21 & 22 Vict. c. 94 ("The Copyhold Act, 1858 "), s. 21, "Whenever by the Copyhold Acts power is given or an obligation attaches to any person to pay money as consideration or compensation for commutation or enfranchisement, it shall be lawful for such person, with the consent of the commissioners, to charge upon the land commuted or enfranchised the sum of money paid." **345.**

Considera-  
tion money,  
etc., may be  
charged on  
land.

By s. 22, "Whenever land is conveyed as consideration or compensation for commutation or enfranchisement, and the person conveying the same was absolute owner of the land so conveyed, it shall be lawful for such person, with the consent of the commissioners, to charge upon the land commuted or enfranchised such reasonable sum as in the judgment of the commissioners may be equivalent in value to the land so conveyed." **346.**

Value of  
land given  
as enfran-  
chisement  
considera-  
tion may be  
charged.

By s. 23, "Where power is by the Copyhold Acts given

Power to  
lords to

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charge the  
land  
purchased.

to the lord to purchase the tenant's interest in land, he shall have the same right to charge the land purchased, and also the manor and any land settled therewith to the same uses, as a tenant has under this Act to charge enfranchisement moneys." **347.**

Expenses  
may be  
charged.

By s. 24, "Any expenses incurred in proceedings under the Copyhold Acts may be charged upon the manor or upon the land commuted or enfranchised, or upon both, according as the obligations to pay may attach, or expenses payable by the lord may be paid out of the compensation or consideration money, or be charged upon the rent charge or other consideration or compensation for commutation or enfranchisement." **348.**

How consi-  
deration  
moneys,  
etc., may be  
charged.

By s. 25, "Any charge under this Act in respect of consideration or of compensation money, or of purchase money, or of the value of land conveyed, may, when the parties so agree and the commissioners approve, be made for a principal sum and interest, or for a series of periodical payments, which, at the termination thereof at the period specified, shall leave the manor or land discharged." **349.**

Certain  
expenses  
may be  
charged as  
considera-  
tion money.

By s. 26, "Whenever by the provisions of the Copyhold Acts any lord or tenant is authorised to raise money upon charge, or to purchase or convey any land, and to charge the principal or the purchase money or the value upon a manor or land, then the expenses incurred about the raising of such money upon charge, or incurred about the purchase, or purchase and conveyance, shall (but as distinct from the general expenses of commutation or enfranchisement) be considered for all purposes or effects of charging as part of the principal purchase money or value to be charged." **350.**

Charge for  
expenses  
not to  
exceed  
fifteen  
years.

By s. 27, "All other charges in respect of expenses of proceedings under the Copyhold Acts (except the expenses of a purchase by a lord) shall be for such period as the



parties may agree and the commissioners may approve, not exceeding fifteen years, and at such interest as stated in the certificate of charge." **351.**

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By s. 28, "If, by reason of disputes as to title, it shall appear to the commissioners to be uncertain upon what person the order to pay costs or expenses should be made, the commissioners may, if they shall so see fit, grant to the person entitled to receive payment of such costs or expenses a certificate of charge upon the manor or land, as the case may be, in respect of which such costs or expenses were incurred, which shall operate in all respects as other certificates of charge under this Act." **352.**

Commissioners may in certain cases grant certificates of charge for expenses.

By s. 29, "Every charge under this Act shall be made by a certificate under seal of the commissioners, and countersigned by the person at whose instance the charge is made, to be called a certificate of charge; and if such charge shall be a series of periodical payments which, at the termination thereof at a period specified, shall leave the manor or land discharged, such series shall be specified in the certificate; but if the charge shall be a principal sum bearing interest, and repayable at or before a certain future date, or after a certain notice, then such certificate shall specify the whole amount of principal money to be charged, and shall contain a proviso declaring that such certificate shall be void on payment of the amount thereby secured, with any arrears of interest due thereon, at a time therein appointed, or at the expiration of an ascertained notice; and such certificate shall state whether the charge was made in respect of costs or expenses, or in respect of consideration or compensation money, and may specify any place, to be agreed upon between the parties, as the place of payment of the principal money and interest charged by such certificate; and the manor or land charged thereby may be described by reference to the enfranchisement

Certificate of charge.

PART II.  
T. 3, CH. 3.

proceedings under the Copyhold Acts, or otherwise, as the commissioners may see fit." 353.

Certificate transferable.

By s. 30, "Every certificate and the charge thereby made shall be transferable by indorsement on such certificate." 354.

Lord's charge to be appurtenant to the manor.

By s. 31, "Whenever a lord of limited interest shall be entitled to a certificate of charge in respect of enfranchisement money left chargeable upon the land enfranchised, the charge shall remain appendant and appurtenant to the manor (but not so as to be incapable of being severed therefrom, or to be affected by the extinction thereof); and the certificate of charge shall state that the lord to whom such certificate is issued has only a limited interest in such charge, or it may purport to be issued to the lord for the time being of the manor; and either of such statements in such certificate shall be notice to all persons of the limited interest in such charge which may pass by transfer of such certificate." 355.

Priority of charge.

By s. 33, "Any charge under this Act made in consideration of the value of land conveyed as consideration, or of consideration or compensation money, or of purchase money, or of the expenses of purchase and conveyances, shall be a first charge on such manor or land and shall have priority over all mortgages, charges, and incumbrances whatsoever affecting such manor or land (except tithe commutation rent charges, and any charges or rent charges which may have been or shall be charged upon the same land for the drainage thereof, by virtue of any of the statutes in that behalf), notwithstanding the actual priority in point of date or anterior title of such mortgages, charges, and incumbrances; but any moneys already invested or previously secured or charged thereon may be continued on the security of the same, notwithstanding the imposition of the said charge under this Act." 356.

Charge not to merge.

By s. 34, "Any such certificate of charge may be taken

by any person, although he may be the lord or tenant or owner of any manor or land charged thereby; and the same shall not merge in the freehold, unless the owner of such charge shall, by indorsement upon the certificate of charge or otherwise declare in writing that it is his will that such charge shall merge and cease." **357.**

By s. 35, "The owner for the time being of a certificate of charge shall, in respect of any payment in the nature of interest or instalment that may become due under the certificate, have the same remedies and be subject to the same conditions in the recovery thereof as are by the Copyhold Acts provided in respect of rent charges; and for a further and additional remedy in that behalf, and in respect of any payment in the nature of interest, or of a periodical payment, or of an instalment, or of a gross principal sum, that may be secured by the certificate, the manor or land shall from the date of the certificate stand charged with the respective sums mentioned in such certificate to be payable, and until such payment the owner for the time being of the certificate shall be deemed to stand seised of the manor or land as a mortgagee in fee thereof, and it shall be lawful for the person so seised from time to time to adopt such means and proceedings as a mortgagee in fee of freehold land is entitled to, for the enforcing payment of principal sums, or interest, with the like right to obtain payment of all attendant and incident costs and expenses." **358.**

And by s. 52, "This Act shall be taken and construed as part of the Copyhold Acts" (a). **359.**

(a) The Copyhold Acts are very lengthy. But the above appeared to be the only provisions necessary to be borne in mind, as distinguished from a multitude of others, which may be looked to *pro re nata*. As to most of the above provisions, the

only satisfactory way seemed to be to give them verbatim.

As to enfranchisements reserving or excepting minerals, see stat. 25 & 26 Vict. c. 108, *infra*, Part IV., Tit. 1, c. 2.

PART II  
T. 3, CH. 8.

Sums  
charged,  
how to be  
recovered.

Land  
charged  
with en-  
franchise-  
ment con-  
siderations  
as on  
mortgage in  
fee.

PART II.  
T. 3, CH. 3.

Title to make  
enfranchise-  
ment on con-  
tract for sale  
of freehold of  
enfranchised  
land.

[And as regards the title to enfranchised land, it is now enacted by the stat. 44 & 45 Vict. c. 41, s. 3 (Appendix). with respect to contracts for sale, so far as a contrary intention is not expressed therein, made after the 31st day of December, 1881, that "(2) Where land of copyhold or customary tenure has been converted into freehold by enfranchisement, then under a contract to sell and convey the freehold, the purchaser shall not have the right to call for the title to make the enfranchisement"] (a). 359a.

(a) *Infra*, par. 1627.

## TITLE IV.

### OF INTERESTS OF FREEHOLD DURATION ; AND, FIRST, OF FREEHOLDS OF INHERITANCE.

#### CHAPTER I.

##### FREEHOLD INTERESTS AND INTERESTS LESS THAN FREE- HOLD DISTINGUISHED.

AN estate or interest of freehold duration is an estate or interest in lands or tenements, which may endure for ever, or is limited to endure for a life or lives, or for some uncertain period that may last for the life of the grantee or some other person at least, without being confined to a given number of years (*a*). **360.**

PART II.  
T. 4, CH. 1.  
Definition of  
an estate of  
freehold  
duration.

An interest confined to a given number of years, however many they may be (as 10,000 years), is an interest less than freehold, a term for years, a chattel interest, a chattel real (*b*). **361.**

Explanatory  
observa-  
tions.

In order rightly to understand this subject, it is necessary to observe, that the ownership of which lands and tenements are susceptible, whether it be merely legal, merely equitable, or both legal and equitable (*c*), is of as unlimited duration as the lands and tenements themselves. And this ownership, and the duration thereof, are respectively capable of being divided into an indefinite number of successive parts and periods of duration ; as where one

(*a*) See Co. Litt. 43 b ; Burton,  
§ 723.

(*b*) See *supra*, par. 5.

(*c*) See *infra*, Tit. 8.

PART II.  
T. 4, CH. I.

person is to have lands or tenements for his life, and, after his decease, another person and the heirs of his body are to have such lands or tenements; and, after his decease and failure of heirs of his body, a third person is to have the same for his life, or for ever. When so divided, each of these successive parts constitutes an interest of freehold duration, or an estate of freehold (*a*). 362.

But, besides the three kinds of ownership to which we have alluded, namely, merely legal, merely equitable, and both legal and equitable, there is another kind of interest which is commensurate with the duration of lands and tenements, namely, the rightful possession. This may be either conjoined with any of the three kinds of ownership, or it may exist apart from them, so as to constitute a distinct interest. When it has this separate existence, it is deemed personal property, a mere chattel interest, although as savouring of the land, which is real property or realty, it is denominated a chattel real, as distinguished from a chattel personal. 363.

The rightful possession of things real, when thus forming a distinct interest, and the ownership of chattels personal, and the duration of such possession or ownership, may, like the ownership of things real and the duration thereof, be respectively divided into an indefinite number of successive parts or periods of duration. But here a wide and essential distinction exists as to the successive parts or the successive periods of duration. The ownership of things real can only be divided into parts of the measure of freehold, that is, estates for life, and estates of inheritance. The rightful possession of things real, when existing apart from the ownership of things real, can only be granted or devised for terms of years: while the ownership of chattels personal may be granted or be-

(*a*) See Smith's Executory Interests annexed to Fearn, Part 1, c. 3.

queathed for any periods, for life, or for years, or otherwise, subject to the operation of the rule against perpetuities, and the distinctions of which we shall speak hereafter (a). **364.**

PART II.  
T. 4, CH. 1.

This distinction between the portions or periods of duration for which the ownership of things real may be granted or devised, and the portions or periods of duration for which the rightful possession of things real may be granted or devised, or, in other words, between the parts into which the ownership of things real may be divided, and the parts into which the rightful possession of things real, when constituting a distinct interest as a chattel real, may be divided, forms the distinction in point of essence between real property and terms for years, and the infallible criterion as regards the manner of their creation. Thus, a devise of land to or in trust for a person indefinitely or for life, or to or in trust for him and the heirs of his body or his heirs, confers upon him the ownership of the land, either legal or equitable, or both legal and equitable, giving him a freehold estate and real property. But a devise of land to or in trust for a person for years, though it be for 10,000 years, only confers upon him the rightful possession, either legal or equitable, or both legal and equitable, which is quite distinct from and collateral to the ownership of the land, and is a mere chattel interest, term for years, or chattel real, which, if he dies without having disposed of it by will, passes, not to his heir, on whom his undisposed-of real estate would devolve, but, like the rest of his undisposed-of personalty, to his executor or administrator. The land itself is in words granted or devised in each case; but, in the former case, the ownership of the land is given, a freehold estate is created, and the grantee or devisee takes real property; while, in the latter, the possession only is given, a term for years only is created, and the

(a) Part II, Tit. 9, c. 1, s. 2.

PART II.  
T. 4, CH. 1.

grantee or devisee takes only a chattel interest, a chattel real, a thing personal. This distinction is strikingly exemplified by the two cases of a grant or devise of land to a person for life, and a grant or devise of land to a person for ninety-nine years, if he shall so long live. Here the land itself is in each case granted or devised in words, and the eventual duration of the two interests must be exactly alike ; but, in the first case, the grantee takes a portion of the ownership of which the land is susceptible, a freehold, a real estate ; while, in the latter, he takes only a portion of the possession of which the land is susceptible, a term for years, a chattel interest, a chattel real, a thing personal. **365.**

A freehold cannot be created out of an estate less than freehold.

An estate of freehold cannot be created out of an estate less than freehold ; so that an estate of freehold cannot be devised out of a term of years, however long the term may be (a). **366.**

The ownership of estates of freehold duration is termed "seisin," and the owners are said to be "seised" or possessed thereof. The ownership of chattels, real or personal, is termed "possession," and the owners are never said to be "seised," but to be "possessed" thereof. Seisin is either in deed, that is, actual, or in law, that is, constructive (b). **367.**

Freeholds of inheritance, and freeholds not of inheritance.

Estates of freehold are, either, I. Freeholds of inheritance ; or, II. Freeholds not of inheritance (c). **368.**

(a) 1 Cruise T. 8, c. 1, § 34.

(b) Co. Litt. 17 a, 266 b, 1.

(c) 2 Bl. Com. 104, 120 ; 1 Cruise T. 1, § 39.



## CHAPTER II.

## OF FREEHOLDS OF INHERITANCE.

A **FREEHOLD** of inheritance is an estate which, on the death of the first taker, devolves to his heirs general or special. **369.**

PART II.  
T. 4, CH. 2.

Definition  
of a freehold  
of inherit-  
ance.

Freeholds of inheritance are either, I. Fees simple; or, II. Limited fees (*a*). **370.**

## SECTION I.

*Of an Estate in Fee Simple.*

In the sense in which the term is ordinarily and properly used, an estate in fee simple (or, as it is frequently termed for brevity, a fee) is an absolute estate of inheritance, clear of any condition, limitation, or restriction to particular heirs, and descendible to the heirs general, whether male or female, lineal or collateral (*b*). But in another sense, in which the term is sometimes used, an estate in fee simple is an estate of inheritance descendible to the heirs general, whether male or female, lineal or collateral. In this sense, a fee simple may be given in such a manner as to be subject to be defeated in a given event (*c*). **371.**

Pr. II. T. 4,  
CH. 2, s. 1.

Definition  
of an estate  
in fee  
simple.

I. In order to create by *deed* an estate in fee simple in favour of a private individual, as distinguished from a corporation, it [was formerly] necessary to use the word heirs; as, to A. and his heirs (*d*). **372.**

Words  
"heirs"  
[or "in fee  
simple"]  
necessary  
to create a fee  
by deed.

(*a*) 2 Bl. Com. 104.

104; Burton, § 14, 15; 1 Cruise T.

(*b*) See Co. Litt. 1 b; Litt. s. 293;

1, § 41.

2 Bl. Com. 106; Burton, § 14.

(*d*) Co. Litt. 8 b, 9 a; *Lucas v.*

(*c*) See Co. Litt. 1 b; 2 Bl. Com.

*Brandreth* (No. 2), 28 Beav. 274.

Pr. II. T. 4.  
Ch. 2, s. 1.

[That rule, however, is altered by stat. 44 & 45 Vict. c. 41, s. 51 (Appendix), which enacts with respect to deeds executed after the 31st day of December, 1881, that "in a deed it shall be sufficient in the limitation of an estate in fee simple to use the words in fee simple without the word heirs"; so that now, either the word heirs or the words in fee simple must be used.] **372a.**

[And that rule admitted] of a few exceptions: thus—

**Exceptions.**

1. In release by one coparcener or joint tenant to another.

1. If one coparcener or joint tenant in fee releases all his right to another, it will pass a fee without the word heirs; because by discharging the claims of the one, the release causes the other to have the whole in fee (a). **373.**

2. In case of rent for equality of partition.

2. If one coparcener grants a rent to the other for equality of partition, an estate in fee simple in the rent will pass without the word heirs, as the rent comes in lieu of the inheritance (b). **374.**

3. In releases by way of mitter le droit.

3. In releases that enure by way of extinguishment or by way of mitter le droit, the word heirs is not necessary to create a fee simple (c). **375.**

Word "heirs" not necessary in a will; but an indication of intention to pass a fee was necessary under old law.

What are sufficient indications.

II. The word heirs need not be used in a will to create an estate in fee simple (d); but still, in the case of wills made before the year 1838, it is necessary that there should be some indication of an intention to give a fee, in or connected with the gift itself (e). **376.**

With regard to the question what are sufficient indications of such an intention, as a general rule, a devise to a person indefinitely, or to him and his assigns, only gave him an estate for life (f), even though made in substitution

(a) Co. Litt. 9 b; 4 Cruise T. 32, c. 21, § 7; 2 Pres. Shep. T. 327, 346; Burton, § 57.

(b) 4 Cruise T. 32, c. 21, § 7; Co. Litt. 10 a.

(c) 4 Cruise T. 32, c. 21, § 8; Co. Litt. 9 b. See *infra*, Part III. T. 12, c. 2, s. 8.

(d) Co. Litt. 9 b; 6 Cruise T. 38, c. 11, § 2.

(e) See 2 Jarm. Wills, 2nd ed. 219; *Morris v. Lloyd*, 3 Hurl. & Cok. 141.

(f) 6 Cruise T. 38, c. 13, § 9; Co. Litt. 9 b; Burton, § 284; 2 Jarm. Wills, 2nd ed. 219; *Harding v.*

for a devise in fee, whether by way of conditional limitation or by way of revocation; as where a testator devised in fee by his will, but revoked the devise, and gave the property to another person indefinitely by a codicil (a). But—

Pr. II. T. 4,  
Ch. 2, s. 1.

1. Any words in or connected with the gift itself sufficiently indicative of an intention to give the whole of the testator's interest, would give the devisee a fee (b). Hence a devise to a person "in fee simple," or "to him for ever," or "to him and his successors," or "to him and his blood," or "to him and his," or to a person generally "to give, sell, or to do what he pleases with it," would always give him the fee; but a devise to a person expressly for life, with a power of disposal, would only give an estate for life, with a power to dispose of the reversion (c). Again, the words "all my real property," or "all right, title, and interest," or "all property," will carry an estate in fee simple (d). So, also, will the word "remainder" or "reversion," after a disposition of a particular estate (e). So the word "part" or "share," or "undivided quarter," as denoting the testator's interest, carries the fee (f). And the words "all my estate," or "my estate," or "estates," occurring among the very words of gift, pass a fee simple (g), unless the word estate is used as unequivocally descriptive merely of the lands devised, and not of the interest in them (h). Wherever it is possible, however, the Courts, in effectuation of the real intention of the testator, will con-

1. Inten-  
tion to give  
the whole  
interest.

*Roberts*, 10 Exch. 819; *Bolton v. Bolton*, L. R. 5 Ex. 145.

(a) *Doe d. Brodbelt*, 12 Moore P. C. C. 116.

(b) 6 Cruise T. 38, c. 11, § 2, 9.

(c) *Burton*, § 290; Co. Litt. 9 a; Litt. a. 586; 6 Cruise T. 38, c. 13, § 5; 2 Jarm. Wills, 2nd ed. 225.

(d) 6 Cruise T. 38, c. 11, § 33, 35; 2 Jarm. Wills, 2nd ed. 233;

*Footner v. Cooper*, 2 Drew 7.

(e) 6 Cruise T. 38, c. 11, § 47; 2 Jarm. Wills, 2nd ed. 234.

(f) *Burton*, § 288; 2 Jarm. Wills, 2nd ed. 235; see *Re Arnold's Estate*, 33 Beav. 163, where the word "moiety" was used; *Manning v. Taylor*, L. R. 1 Ex. 235.

(g) 6 Cruise T. 38, c. 11, § 24; *Burton*, § 286; 2 Jarm. Wills, 2nd ed. 226, 228—9.

(h) See 6 Cruise T. 38, c. 13, § 35.

Fr. II. T. 4.  
Ch. 2, a. 1.

strue the word estate as referring to the interest of the testator as well as to the land itself. And the circumstance of the testator being described as in the occupation of the estate, is not enough to make the word "estate" a mere description of locality; as where the testator uses the expression "my estate that I now live in" (a). Nor is the circumstance of the estate being referred to as called by a certain name (b). And under a devise of "all that farm or estate I bought of A., containing about twenty acres, situate at, etc., and in the occupation of, etc.," or "all my estates in the occupation of, etc., in the parish of, etc.," it was held that the devisee took a fee simple (c). The word "perpetual," however, as applicable to an advowson, is only descriptive of the things devised, and not of the quantum of interest (d). 377.

2. Duty of  
making a  
payment.

2. Where a devise is made without any words of limitation, and without any indication that the devisee should only take for life, but the testator imposes upon the devisee the obligation (whether legal or only moral) of making any payment, whether annual or in gross, and whether great or small, in consequence of which he might be a loser if the interest devised to him ceased with his life, inasmuch as he might not enjoy the estate long enough to enable him to reimburse himself, he will take a fee. But where the charge is thrown entirely on the land devised, the devisee will not take the fee, as in that case he can be no loser by taking for life only (e). 378.

(a) *Doe d. Pottow v. Fricker*, 6 Exch. 510.

(b) *Burton*, § 287.

(c) See *Burton*, § 289; *Burton v. White*, 7 Exch. 720; *White v. Coram*, 3 K. & J. 652.

(d) 6 Cruise T. 38, c. 13, § 35; *Burton*, § 289; 2 Jarm. Wills, 2nd ed. 236.

(e) Co. Litt. 9 a; 6 Cruise T. 38,

11, § 55, 62, 66, and c. 13, § 25, 29; *Burton*, § 291; 2 Jarm. Wills, 2nd ed. 220, 221; *Winter v. Perratt*, 9 Cl. & Fin. 606; *East v. Tryford*, 4 H. L. Cas. 553; *Doe d. Sams v. Garlick*, 14 Mee. & W. 698; *Blinston v. Warburton*, 2 K. & J. 400; *Furnough v. Nock*, 11 Exch. 37; *Burton v. Powers*, 3 K. & J. 170; *Lloyd v. Jackson*, L. R. 1 Q. B.

3. A devise generally, with a limitation over if the devisee dies under age, will give the prior devisee an estate in fee simple (a); for, if the prior devisee were only to take an estate for life, the time of his death must be immaterial to the devise over. Indeed, the prior devisee will take a fee, if there is a devise over before any given period or under any given circumstances; because if the property was to go over in a specified event, it must be taken to have been intended that it should never go over in any other (b). **379.**

4. Under a devise to trustees, and their heirs, "upon trust for the use and benefit of" a person, his interest is co-extensive with theirs, and therefore he takes an equitable fee (c). **380.**

5. The general rule, under the old law, is, that trustees take as great an estate as the purposes of the trust require, and no more (d). Hence, even under the old law, where lands were devised to trustees for the purpose of performing any trusts which required the absolute property, an estate in fee simple would pass to the trustees without any words of limitation (e). And in the case of a devise to trustees for sale, though only a part of the inheritance was required to be sold, yet the Court considered them as trustees of the whole inheritance (f). But, on the other hand, in cases not within the stat. 1 Vict. c. 26, where there is a devise for trustees for particular purposes, even with words of limitation or other expressions which, in the case of a devise to

Pr. II. T. 4,  
Ch. 2, s. 1.

3. Limitation over on any given event or under any given circumstances.

4. Devise in fee to trustees.

5. Rule as to estate taken by trustees.

Trusts requiring a fee.

571; 2 Q. B. (Ex. Ch.) 269; *Bolton v. Bolton*, L. R. 5 Ex. 145; *Pickwell v. Spencer*, L. R. 6 Ex. 190; 7 Ex. (Ex. Ch.) 105.

(a) 6 Cruise T. 38, c. 11, § 74, 75; 2 Jarm. Wills, 2nd ed. 223.

(b) *In re Harrison's Estate*, L. R. 5 Ch. Ap. 408.

(c) *Moore v. Clegghorn*, 10 Beav. 423; affirmed on appeal, 17 L. J. 400.

(d) *Burton*, § 294; 2 Jarm. Wills, 2nd ed. 251; *Adams v. Adams*, 6 A. & E. (N. S.) 860; *Creaton v. Creaton*, 3 D. M. & G. 386; *Stevenson v. Mayor of Liverpool*, L. R. 10 Q. B. 81.

(e) 6 Cruise T. 38, c. 11, § 78; *Burton*, § 292; 2 Spence's Eq. Jur. 295; *In re Bird's Trusts*, L. R. 3 Ch. D. 214.

(f) 2 Spence's Eq. Jur. 295.

Pr. II. T. 4, a person for his own benefit, would carry the fee, the Courts will consider the legal estate as vested in the trustees as long as the execution of the trust requires it, and no longer; and will therefore, as soon as the trusts are satisfied, consider the legal estate as vested in the persons who are beneficially entitled to it (a). And hence, where lands were devised before the stat. 1 Vict. c. 26, to trustees and their heirs, in trust to permit A. to take the rents and profits during his life, with a proviso that they should pay an annuity to another person, A. took the legal estate on the death of that person in A.'s lifetime (b). 381.

But the rule mentioned in the preceding paragraph does not apply to a deed. A grant to trustees and their heirs gives them the fee, notwithstanding any implied intention that they should take a less estate (c). 382.

New law as  
to persons  
taking a fee.

III. In regard to wills made since the commencement of the year 1838, it is enacted by the stat. 1 Vict. c. 26, s. 28, that "where any real estate shall be devised to any person without any words of limitation, such devise shall be construed to pass the fee simple or other the whole estate or interest which the testator had power to dispose of by will in such real estate, unless a contrary intention appear by the will." By this enactment the rule of law is reversed. An indefinite devise now *primâ facie* imports a devise in fee, while such a devise, before the year 1838, *primâ facie* imports a devise for life only. By s. 30 it is further enacted, that, "where any real estate (other than or not being a presentation to a church) shall be devised to any trustee or executor, such devise shall be construed to pass the fee simple or other the whole estate or interest which the testator had power to dispose of by will in such real estate,

(a) 1 Cruise T. 12, c. 1, § 28;  
Burton, § 294; Co. Litt. 290 b, n.  
1. VIII.

(b) *Adams v. Adams*, 6 A. & E.

(N. S.) 860.

(c) *Cooper v. Kynock*, L. R. 7 Ch.  
Ap. 398.

unless a definite term of years, absolute or determinable, or an estate of freehold, shall thereby be given to him expressly or by implication." And by s. 31 it is further enacted, "that where any real estate shall be devised to a trustee, without any express limitation of the estate to be taken by such trustee, and the beneficial interest in such real estate, or in the surplus rents and profits thereof, shall not be given to any person for life, or such beneficial interest shall be given to any person for life, but the purposes of the trust may continue beyond the life of such person, such devise shall be construed to vest in such trustee the fee simple, or other the whole legal estate which the testator had power to dispose of by will in such real estate, and not an estate determinable when the purposes of the trust shall be satisfied." 383.

IV. It will be seen in a subsequent page, that, in consequence of the rule in *Shelley's case*, a person may take an estate in fee simple, by virtue of a limitation of a freehold to himself, followed by a remainder to his heirs (a). 384.

Fee under  
rule in  
*Shelley's*  
*case*.

## SECTION II.

### *Of Limited Fees : and First, of Base or Qualified Fees.*

A limited fee is an estate which is either descendible to heirs of a certain class or heirs sustaining a certain character only, or is subject to some condition, limitation, or restriction, which may abridge its duration. 385.

Pr. II. T. 4,  
Ch. 2, s. 2.

Definition of  
limited fees.

Limited fees are of four kinds :

They are of  
four kinds.

1. Base or qualified fees.
2. Fees subject to a condition subsequent or conditional limitation.
3. Fees conditional at the common law.

(a) See *infra*, Sect. 4.

Pr. II. T. 4,  
Ch. 2, s. 2.

#### 4. Fees tail.

Definition of  
a base or  
qualified fee.

A base or qualified fee is an estate which is descendible to the heirs general, but subject, either in terms or by operation of law, to a limitation or qualification which serves to mark out the bounds of such estate, so as to render it determinable in a given event before the failure of heirs general. As where land is given to A. and his heirs, tenants of the manor of Dale, or to A. and his heirs so long as B. has heirs of his body (a); or where a person, by means of an imperfect alienation of a tenant in tail, has an estate to himself and his heirs so long as the tenant in tail shall live or there shall be issue inheritable under the entail (b). **386.**

Rights and  
powers of  
owner.

The proprietor of a base or qualified fee has the same rights and privileges over his estate till the qualification upon which it is limited is at an end, as if he were tenant in fee simple (c). **387.**

Stat. 45 & 46  
Vict. c. 38,  
s. 58. The  
Settled Land  
Act, 1882.

[And further by virtue of stat. 45 & 46 Vict. c. 38, s. 58 (Appendix), a person entitled to a base fee, although the reversion is in the Crown, and so that the exercise by him of his powers under that Act binds the Crown, and also a tenant in fee simple, with an executory limitation, gift, or disposition over, on failure of his issue, or in any other event, have each, when the estate or interest of each of them is in possession, the powers of a tenant for life under that Act, and its provisions referring to a tenant for life, either as conferring powers on him or otherwise, and to a settlement, and to settled land, extend to each of them, and to the instrument under which his estate or interest arises and to the land therein comprised.] **387a.**

(a) See 2 Bl. Com. 109; 1 Cruise  
T. 1, § 76—79, and T. 2, c. 2, § 10,  
41; 1 Pres. Shep. T. 107; Burton,

§ 715.

(b) See *infra*, par. 428.

(c) 1 Cruise T. 1, § 80.



## SECTION III.

*(Of Fees subject to a Condition Subsequent or Conditional Limitation.*

A fee subject to a condition subsequent or a conditional limitation is an estate which is descendible to the heirs general, but subject to the destructive operation of a condition subsequent (a), or a conditional limitation (b) subjoined to the clause whereby such estate is created. It will be perceived that this kind of fee is included in the second definition which has been given in the first section, as a definition of an estate in fee simple, in the sense in which the term "fee simple" is sometimes, though improperly, used. **388.**

Pr. II. T. 4  
Ch. 2, s. 3.

## SECTION IV.

*Of Conditional Fees at the Common Law.*

A conditional fee at the common law, was an estate which was given to a person and the heirs of his body, and not to his heirs general. The Courts, which so greatly favoured alienation, treating these fees as subject to a condition that the donees had issue inheritable to the estate, held, that, when the donee had any such issue, the condition was performed, and the estate became absolute to the extent of enabling the donee or his issue to alien or charge the land, and thereby bar not only the issue of the donee, but also the donor of his right to the estate on failure of issue. But if the donee had no issue inheritable to the estate, or if neither he nor his issue aliened, as the

Pr. II. T. 4,  
Ch. 2, s. 4.

Definition of  
a condi-  
tional fee.

Construc-  
tion put  
upon con-  
ditional fees,  
in regard to  
alienation.

(a) See *supra*, par. 154.

(b) See *supra*, par. 168—171.

Pr. II. T. 4, land could descend to no other person by the terms of the grant, it reverted to the donor on failure of issue (a). 389.  
Ch. 2, s. 4.

If the donee of a conditional fee aliened the lands before issue had, and afterwards had issue, the issue were barred. But such alienation did not bar the donor's right of reverter, whenever there happened to be a failure of issue (b). 390.

Learning of conditional fees still necessary.

The learning of conditional fees is necessary to be known ; first, as explanatory of the origin of entails ; and secondly, because it is applicable to such inheritances descendible to the heirs of the body alone of the persons to whom they are given, as are not within the statute of entail ; such as annuities (c). 391.

Fee conditional in copyholds.

Where a devisee would take an estate tail, either expressly or by implication, if the property were entailable, he will take a fee conditional if the property is copyhold of which there is no custom of entail ; and, in such case, if he is also the heir at law of the devisor, and, as such, has the possibility of reverter, the fee conditional will merge in that ; so that on the death of the testator he will be seised in fee simple (d). 392.

## SECTION V.

### *Of Fees Tail.*

Pr. II. T. 4, From the mode of construing conditional fees adopted by the Courts, the purposes for which they were intended were completely frustrated ; and therefore the nobility, in  
Ch. 2, s. 5.  
 Origin of fees tail.

(a) Co. Litt. 19 a, 191 a, n., VI. 7, 241 a, n. 4, 290 b, n. 1, V. 1, 326 b, n. 1, IV. ; 2 Bl. Com. 110, 111 ; 1 Cruise T. 2, c. 1, § 4, 5, 7 : Burton, § 641—2.  
 (b) 1 Cruise T. 2, c. 1, § 6 ; Co.

Litt. 326 b, n. 1 ; 327 a, 1.

(c) 2 Bl. Com. 111 ; Co. Litt. 19 a.

(d) Burton, § 1284, *Doe d. Simpson v. Simpson*, 4 Bing. N. C. 333 ; 5 Scott, 770.

order to perpetuate their possessions in their own families, procured the statute of Westm. 2, 13 Edw. 1, usually called the Statute de Donis Conditionalibus, to be made (a). By that statute, it was in effect enacted, that the intention of the donor should be observed, so that the donee should not have the power, by alienation, of barring the right of his issue, if any, or of the donor, if there should be no issue, or if such issue should fail. In the construction of this statute, the Judges held, that the donee took a particular estate which they denominated fee tail, and that the donor had an ultimate fee simple left in him expectant upon the determination of such particular estate (b). A fee tail or an estate tail is therefore an estate descendible exclusively to the heirs of the body or lineal descendants of the person to whom it is given, in things within the Statute de Donis (c). 393.

Pr. II. T. 4,  
Ch. 2, s. 5.

Definition  
of a fee tail.

Estate tail are either general or special. An estate tail general is an estate which is descendible to all the heirs of the body, or all the heirs male of the body, or all the heirs female of the body, of a sole tenant in tail, by or on whomsoever begotten; so that, however often he or she may marry, his or her issue generally, or issue male or issue female by each marriage, are, in successive order, capable of inheriting: as, where land is given to A. and the heirs of his or her body, or the heirs male of his or her body, or the heirs female of his or her body. An estate tail special is an estate which is descendible to all the heirs of the bodies, or all the heirs male of the bodies, or all the heirs female of the bodies of two persons to whom it is given, or of the body of one person to whom it is given, by a particular husband or wife: as, where an estate is given to A. and B. and the heirs of their bodies, or to A. and the

Estate tail,  
general and  
special.

(a) 1 Cruise T. 2, c. 1, § 8.

(b) 2 Bl. Com. 112; Co. Litt. 327

a, b, 2; 1 Cruise T. 2, c. 1, § 8, 9.

(c) 2 Jarm. Wills, 2nd ed. 266.

Pr II. T. 4. heirs of his body begotten upon B., or to B. and the heirs  
 CH. 2, s. 5. of her body begotten by A. (a). 394.

Estates tail,  
 male and  
 female.

From these definitions it will be perceived that estates tail, whether general or special, may be either in tail male or in tail female. Thus, if lands are given to a man and the heirs male of his body, this is an estate in tail male general; but if to a man and the heirs female of his body on his present wife begotten, this is an estate in tail female special. And whenever an entail is limited to one sex, no descendant of the donee can make himself inheritor to such a gift, unless he can deduce his descent from such donee wholly through that sex (b); so that, if a donee in tail male has a daughter, who dies, leaving a son, such son cannot inherit the estate (c). And so if a gift is made to a man in tail male, remainder to him in tail female, and he has a son, who has a daughter, who has a son, this son is not inheritable to either estate tail. And therefore the safest way, if it is desired to give all the heirs of the body the chance of succeeding in tail, but yet to create a preference in favour of the heirs male, is, to limit the first estate to him and the heirs male of his body, the remainder to him and the heirs of his body (d). 395.

In a deed  
 either the  
 word heirs  
 [with words  
 of procrea-  
 tion] or the  
 words in tail  
 must be  
 used.

In a *deed*, the word heirs [was] as necessary in the creation of an estate tail as in the creation of an estate in fee simple. And there must also be some words of procreation or lineal descent, to show, in effect, that by the word heirs the lineal descendants of the donee are intended, although no technical or precise language is necessary for this purpose. Thus, a grant to A. and the issue of his body, or to A. and his children, will only pass estates for life, for want of words of inheritance. And if a grant is made to A. and

(a) See Co. Litt. 19 b, 20 b, 377 a; 2 Bl. Com. 118; 1 Cruise T. 2, c. 1, § 13; Burton, § 647.

(b) 1 Cruise T. 2, c. 1, § 15; Co. Litt. 19 b, n. 4, 25 b; 2 Jarm.

Wills, 2nd ed. 55.

(c) 2 Bl. Com. 114; 1 Cruise T. 2, c. 1, § 14; Burton, § 649.

(d) Co. Litt. 25 b, 377 a.

his heirs male or female, the word male or female will be rejected, and the grant will pass a fee simple for want of words of procreation or lineal descent, to show out of whose body the heirs are to issue. But a grant to A. and his heirs which he should beget of his wife, or to A. and his heirs if he have heirs of his body, and if he die without heirs of his body, to revert to the donor, will create an estate tail (a). **396.**

Pr. II. T. 4.  
Ch. 2, s. 5.

[But now with respect to deeds executed after the 31st day of December, 1881, it is provided by stat. 44 & 45 Vict. c. 41, s. 51 (Appendix), that the words in tail without the words heirs of the body, shall be sufficient in the limitation of an estate tail; and that the words in tail male or in tail female, without the words heirs male of the body or heirs female of the body, shall be sufficient in the limitation of an estate tail male or of an estate tail female.] **396a.**

Even in the case of a deed, under a limitation to a person and the heirs of his body "begotten," heirs begotten at a future time will take; and under a limitation to a person and the heirs of his body "to be begotten," heirs previously begotten will take (b). **397.**

"Begotten"  
and "to be  
begotten."

In a will, an estate tail may be created by any words denoting an intention to give the devisee an estate of inheritance descendible exclusively to his or some of his lineal descendants. Hence, [neither the word heirs, nor the words in tail, are] necessary to create an estate tail. So that, where lands are devised to A. and his issue, or to A. and his children, and A. has no children at the time, though there be a child in its mother's womb at the date of the will and at the time of the testator's death, he will take an estate tail, unless

In a devise,  
[neither the  
word heirs  
nor the  
words in tail,  
etc., are  
necessary.]  
What words  
are sufficient  
in a will,  
instead of  
the words  
heirs of the  
body, (or of  
the words  
in tail.)

(a) Co. Litt. 20 a, b; Litt. s. 31; Shep. T. 102.

Co. Litt. 27 a; 2 Bl. Com. 115; 4 (b) Co. Litt. 20 b; 1 Pres. Shep. T. 105.

Cruise T. 32, c. 21, § 11, 12, 16, 18; Burton, § 651-2, 658; 1 Pres.

Pr. II. T. 4.  
Ch. 2, s. 5. there is an indication of an intent that the children should take as purchasers (a). **398.**

“Where a testator devises in remainder to the unborn child of a prior taker, even though it be by the designation of eldest son, but he appears to have intended that all the issue of the prior taker should inherit, so far as the rules of descent will permit; in such case, to give effect to the paramount intent of admitting all the issue, the prior taker will have an estate tail, and the description eldest son, child, etc., will not be regarded as a designatio personæ, as pointing out a particular individual who is to take by way of contingent remainder, but as a nomen collectivum, and a word of limitation” (b). Thus, where a testator gave his real estate to his eldest son for life, and to his “eldest legitimate son” after his death; and, in default of such issue, he gave it “in like manner” to another son; and, in case he should have no legitimate issue male, then over; “the eldest legitimate son” was nomen collectivum, and not a designatio personæ, and the first taker took an estate tail male; for the words “in like manner” showed that the first son was to have the same estate as the second, and the second clearly took an estate tail male by implication (c). **399.**

With regard to the [effect of] words of procreation or lineal descent in a will, although a devise to a person and his heirs gives him an estate in fee simple, yet, if the word heirs be qualified by any subsequent words which show the intention of the testator to restrain it to the heirs of the body of the devisee, the devise will in that case only create

(a) 6 Cruise T. 38, c. 12, § 27; 2 Jarm. Wills, 2nd ed. 266; *Wild's case*, 6 Rep. 16; *Webb v. Byng*, 2 K. & J. 669; 8 D. M. & G. 633; S. C. nom. *Byng v. Byng*, 10 H. L. Cas. 171; *Grieve v. Grieve*, L. R. 4 Eq. 180; *Roper v. Roper*, L. R. 3 C. P.

(Ex. Ch.) 32; *Underhill v. Roden*, L. R. 2 Ch. D. 494; *Clifford v. Kee*, L. R. 5 Ap. Cas. 447.

(b) Smith's Executory Interests annexed to Fearn, § 537; *Jenkins v. Lord Clinton*, 26 Beav. 108.

(c) *Lewis v. Puzley*, 16 M. & W. 733.

an estate tail (a). And so a devise to A. and his heirs male gives an estate in tail male (b). 400.

Pr. II. T. 4.  
Ch. 2, s. 5.

In a devise upon trust to settle upon the "issue in tail male," those words are not to be considered as one entire and indivisible expression, and describing as such the first taker and the estate to be taken, and designating as the first purchaser the issue male or sons to the exclusion of the daughters of the person whose issue is spoken of; but the word "issue" expresses the persons to take, i.e., daughters as well as sons, and the words "in tail male" the estate to be taken, whether the words "in strict settlement" be added, or not; because the word "issue" is expressive of either sex, and an estate in tail male may be limited to daughters as well as to sons, or an estate in tail female to sons as well as to daughters (c). 401.

Devise upon trust to settle upon the issue in tail male.

Where an estate is given to the heirs of the body of a person who is dead at the time, the person first answering the description of such special heir will take an estate tail by purchase, descendible to all the issue of the ancestor to whose heirs of the body the gift is so made, whether they are the issue of such special heir or not, in the same manner as if the estate tail has been given to the ancestor himself. And the same is the case where an estate is given to the heirs of the body of a living person, but no estate of freehold is given to him, with which the gift made to the heirs of his body could coalesce under the rule of law called the rule in *Shelley's case* (d). 402.

Estate tail under limitation to the heirs of the body of a deceased person.

Estate tail under a limitation to the heirs of the body of a living person not within the rule, in *Shelley's case*.

An estate tail may arise under the rule in *Shelley's case* (e), in favour of a person to whom apparently an estate for life only is given, with a remainder to his heirs general or special. 403.

Estate tail under the rule in *Shelley's case*, where property is limited to a

(a) 6 Cruise T. 38, c. 12, § 7.

(b) Burton, § 658.

(c) *Trevor v. Trevor*, 1 H. L. Cas. 239.

(d) See 4 Cruise T. 32, c. 21,

§ 33; Burton, § 654; *Vernon v. Wright*, 7 H. L. Cas. 85.

(e) As to the law upon this subject, see Smith's *Executory Interests* annexed to *Fearne*, Part II. c. 12.

Pr. II. T. 4,  
Ch. 2, s. 5.

person, with  
remainder to  
his heirs  
general or  
special.

Rule in  
*Shelley's*  
*case*.

The rule in *Shelley's case* may be thus stated: "When a person, by any deed or will, takes a freehold interest, and, by the same deed or will, a remainder of the same quality, as legal or equitable, is afterwards limited, whether mediately or immediately, to his heirs or the heirs of his body, by that description and in that character, or to his heir or the heir of his body, in the singular number, but as a nomen collectivum in the sense of heirs or heirs of the body; the inheritance, in fee, or in tail, is executed or attaches originally in the person to whom the freehold is limited, as if it had been limited to him and his heirs general or special, instead of attaching originally in the individual first answering the description of his heir general or special" (a). 404.

Limitations of subsequent interests which are not by way of remainder, are not within the rule (b). 405.

How the  
inheritance  
is executed  
in the  
ancestor.

Under the rule in *Shelley's case*, and the doctrine of merger, the subsequent interest is executed in the ancestor in five ways:—I. In possession absolutely. Thus, "if the subsequent limitation of the inheritance follows immediately after the limitation of the freehold to the ancestor, the freehold merges in the inheritance, and the ancestor becomes seised of an estate of inheritance in possession" (c). II. In interest, "if there is any interest intervening between the ancestor's freehold and the inheritance limited to his heirs general or special, and such interest is vested" (d). III. In possession, "subject to the liability of afterwards becoming only executed in interest, if there are interests intervening, but they are only contingent" (e). IV. In possession, to some purposes only, in certain special

(a) Smith's Executory Interests  
annexed to Fearn, § 393—401

(b) Id. § 401 a.

(c) Id. § 408.

(d) Id. § 409. As to vested and  
contingent interests, see *infra*, Part  
II. Tit. 9, c. 1.

(e) Id. § 410.



cases (a). V. As a contingent remainder, if the subsequent limitation is expressly limited upon a contingency (b). 406.

Pr. II. T. 4,  
Ch. 2, s. 5.

Reasons of  
the rule.

The reasons of the rule appear to be these:—1. “In the cases falling within the rule, the two limitations to the ancestor and to his heirs or the heirs of his body, would, generally and in the main, have virtually accomplished the same purposes as a gift of the inheritance, in fee or in tail, to the ancestor himself; and therefore the law construed those limitations to amount to such a gift, in order to prevent the injury which the lord and the specialty creditors would have sustained, if parties had been allowed, generally and in the main, virtually to create an estate of the same quantity, and the same alienable and transmissible quality, as one limited to the ancestor himself, and yet, by a particular mode of limitation, fraudulently to evade the claims of the lord and the specialty creditors of the ancestor” (c). 2. Another reason was, “the desire to facilitate alienation, by vesting the inheritance in the ancestor, instead of allowing it to remain in abeyance until his decease” (d). 3. “In cases that fall within this rule, there are two co-existing yet inconsistent intents: the one of which may be termed the primary or paramount intent, and the other, the secondary or minor intent. And, as these, by reason of their inconsistency, cannot be both effectuated, the secondary or minor intent is sacrificed, in order to give effect to the primary or paramount intent. The primary or paramount intent, in cases falling within the rule, is, that the ancestor should have the enjoyment of the estate for his life; and subject thereto, that the estate should descend to all the heirs general or special of the ancestor, and to none but those who are heirs of the ancestor. The secondary or minor intent is, to accomplish

(a) Id. § 411—417.

(b) Id. § 418.

(c) Id. § 419—428.

(d) See Harg. Tracts, 498, 500.

Pr. II. T. 4.  
Ch. 2. s. 5.

the primary or paramount intent in a particular mode ; in such a mode (as the grantor or deviser imagines) as to secure that primary or paramount intent from being defeated by the act of the ancestor ; in other words, the secondary or minor intent is, that the ancestor should have a life estate only, and that the heirs should take by purchase" (a). 407.

Application  
of the rule in  
cases of legal  
estates and  
trusts  
executed.

In regard to the application and non-application of the rule in cases of legal estates and trusts executed, three general rules or propositions may be laid down :—1. "No circumstances, however strongly and conclusively indicative merely of an intent that the ancestor should take a life estate only, and that his heirs general or special should take by purchase, will be sufficient to prevent the operation of the rule ; nor indeed will the most positive direction to that effect be sufficient for the accomplishment of such a purpose ; because such circumstances or directions only serve to make the secondary intent more clear, without negating the existence of, or in any way affecting, the primary intent." 2. "Nor will the application of the rule be excluded by any words which do not unequivocally indicate, but are only capable of being regarded as indicating the objects of succession to be individuals other than persons who are to take simply as heirs general or special." 3. "But if there are any words referring, not merely to the mode of succession, but to the objects of succession, and clearly and unequivocally explaining or indicating them to be individuals other than persons who are to take simply as heirs general or special of the ancestor, the rule will not apply. For, these words thereby negative the existence of the primary intent, which would otherwise be furnished by the technical word heirs, in connection with the estate of the ancestor ; and thus leave

(a) See Smith's Executory Interests annexed to Fearn, § 429—450.

but one intention to be accomplished, namely, the intention that the heirs should take by purchase" (a). **408.**

Pr. II. T. 4,  
Ch. 2, s. 5.

In regard to trusts executory (b), "the rule is not applied in the case of executory trusts created by will, if there is a clear indication of an intent that it should not be applied.

Application  
of the rule  
to trusts  
executory.

But, in the absence of any such indication, it will be applied" (c). "In the case of executory trusts created by marriage articles, the Court of Chancery will refuse to apply the rule, even in the absence of particular indications of an intent that it should not be applied, except—1. In those cases where it is not in the power of either parent, without the other, to bar the issue. 2. Where the issue are otherwise effectually provided for by the articles; or it appears, from other limitations, that the parties knew and intended the distinction between words which give the parent an estate for life only, and those which would give him an estate tail. 3. Where a trust executory, created by a formal settlement not expressed or not clearly appearing to be made in pursuance of the articles, is substituted for the articles. The reason for not extending the rule to trusts executory, applies with peculiar force to those created by marriage articles; because marriage articles are considered as mere heads of agreement; and a principal intention is, to secure an effectual provision for the issue, who are all purchasers for valuable consideration, and not mere volunteers, like devisees. Hence, where it is agreed to limit lands to the husband for life, remainder to the heirs of his body by his intended wife, or, to the wife for life, remainder to the heirs of her body by her intended husband, or to the husband and wife for life,

(a) Smith's Executory Interests annexed to Fearn, § 453, 472, 479. For a number of points in support and illustration of these propositions, see *Id.* § 454—488 b.

(b) See *infra*, Part II. Tit. 8, c. 2. s. 2.

(c) Smith's Executory Interests annexed to Fearn, § 490.

Pr. II. T. 4,  
Ch. 2, s. 5.

remainder to the heirs of their bodies ; these words are construed to mean first and other sons of the marriage, and the heirs of their bodies " (a). 409.

Application  
of the rule  
to the case  
of limita-  
tions by  
different  
instru-  
ments.

A limitation to a person for life by one instrument, and a limitation to his heirs or heirs of his body by another, cannot unite according to the rule in *Shelley's case*. There is, however, one exception to this in the case of an appointment ; for a limitation to a person for life by deed, and a limitation afterwards in his lifetime to his heirs or the heirs of his body, under an execution of a power of appointment contained in the deed creating the life estate, will coalesce ; because the limitation of the inheritance takes effect, as if it were contained in the deed creating the power (b). 410.

Estate tail  
in the case of  
a devise to a  
person and  
his issue.

In cases of a devise to a person, followed by a devise to his issue (c), an estate tail sometimes arises in his favour, by analogy to the rule in *Shelley's case*, and under the doctrine of approximation to the intention of the testator, called the cy pres doctrine. Thus, "where real estate is devised, either directly to, or by way of executed trust for, a person and his issue, whether in one unbroken limitation, or in two distinct limitations, the word issue will be construed a word of limitation, so as to confer on the ancestor an estate tail, if there are no expressions clearly showing, that, by issue, the testator meant children, or particular individuals among the descendants of the ancestor, and no expressions indicative of an intent that the issue should take by purchase, or none but what are capable of being resolved into the mere redundant expression of that which would be included in an estate tail in the ancestor " (d). 411.

(a) Smith's Executory Interests annexed to Fearn. § 490, 494—6.

(b) 2 Sugd. Pow. 24—5.

(c) For a discussion of this subject, see Smith's Executory Inter-

ests annexed to Fearn. Part II. ch. 13.

(d) Smith's Executory Interests annexed to Fearn. § 504 ; *Brater v. Nowell*, 25 Beav. 551.

One reason of this is, that the word issue is ill adapted for a word of purchase, by reason of its ambiguity ; whereas it possesses the same aptitude for a word of limitation as the technical expression heirs of the body (a). Another reason is, that the law will not restrict the estate of the ancestor to a life estate, and give the inheritance to the issue as purchasers, where it is not certain that such was the intention of the testator ; because, in this case, there is, on the one hand, an apparent primary or paramount intent, founded in the most vehement presumption, not only that the ancestor should take for life, but that, subject thereto, the estate (as far as the rules of descent will permit) should pass to all his descendants, which it might not if they could only take by purchase ; and, on the other hand, an apparently, and only an apparently, certain secondary or minor intent, that the ancestor should have a life estate only, and that the issue should take by purchase ; and hence there is nothing sufficiently express and unequivocal to exclude or negative the apparent primary intent ; and, consequently, such apparent primary or paramount intent is justly allowed to overrule the apparent secondary or minor intent (b). 412.

“ But, in the case of an executory trust by marriage articles, in favour of a person in esse and his issue, his children will take as purchasers, even in the absence of any indication that they should take by purchase : because, they are considered as purchasers for valuable consideration : and, in the case of an executory trust, the intent that the issue should take by purchase can be effectuated without sacrificing the primary intent of admitting all the issue ; for, the conveyance to be made in pursuance of the trust can be so framed, that all the descendants shall take,

(a) Smith's Executory Interests annexed to Fearn, § 510—513. planation of this, see Id. § 514—528.

(b) For a discussion and ex-

Pr. II. T. 4,  
Ch. 2, s. 5.

Pr. II. T. 4.  
Ch. 2, s. 5.

before the estate can revert or go over. So that, where it is agreed to limit lands in remainder to or for the issue of the tenant for life, a strict settlement will be directed to be made upon the first and other sons in tail, remainder to the daughters, etc. In the case of an executory trust by will, in favour of a person in esse, and his issue, the children will take by purchase, if, on the whole, it appears most probable that the testator intended them to take in that manner. Where the limitation to the ancestor, viewed by itself, would create a mere equitable estate, and the limitation to the issue a legal estate, or vice versa, the issue will take by purchase, in the same manner as the heirs of the body, under similar circumstances" (a). 413.

Estate tail  
in the case  
of a devise  
to the child  
of an un-  
born child.

"Where a testator devises an estate tail to a grandchild, by a child not yet born at the testator's death, to take by purchase; and he appears to have intended that all the issue of such unborn child should take, so far at least as the rules of descent will permit; the Courts, though obliged to sacrifice his minor intent, that the grandchild, by such unborn child, should take by purchase, because it is contrary to the rule against perpetuities (b), will nevertheless, under the doctrine of approximation, or, as it is commonly called, the cy pres doctrine, give effect to his paramount intent, that all the issue of the unborn child should take, by giving an estate tail to such unborn child, so as to enable the grandchild to take derivatively through such unborn child, though it cannot be allowed to take in the particular mode pointed out by the testator" (c); [but such a construction is only adopted in case of a will]. It has been held, however, that the cy pres doctrine ought not to be extended; so that it has been held to be in-

(a) Smith's Executory Interests c. 1, s. 5.  
annexed to Fearn, § 531—3.

(b) See infra, Pt. II. T. 9. (c) Smith's Executory Interests  
annexed to Fearn, § 534.

applicable where the limitation to the children of the unborn child is in terms which would give them a fee simple (a). 414.

Pr. II. T. 4,  
Ch. 2, s. 5.

Where a testator attempts to create a perpetual succession of life estates in favour of children and more remote descendants, there, if the children are in esse at the death of the testator, they will take estates for life, and their children, if unborn, will take estates tail under the cy pres doctrine, or doctrine of approximation, in order that the descendants of such children may take derivatively through such children, as they cannot take independently by purchase, on account of the rule against perpetuities (b). 415.

Estate tail in the case of an intended perpetual succession of life estates.

An estate tail may be created by implication (c). Thus, where a testator, after devising real estate to one person, without any express devise to the issue of such person, makes a devise over to another on an indefinite failure of issue male or female, or issue in general, of the prior taker; in such case, the prior taker has an estate tail by implication, with a remainder over to the other person. This construction is adopted, in order to effectuate the indirectly declared intent that the estate should go over on, but not until, an indefinite failure of issue male or female, or issue in general, of the prior taker. And it is adopted, as well where the prior limitation is in words which would pass a fee, as where it is indefinite, or expressly for life (d). 416.

Estate tail by implication.

(a) *Hale v. Perr*, 25 Beav. 335.

(b) *Smith's Executory Interests* annexed to *Fearne*, § 536, 536 a; *Parfitt v. Hember*, L. R. 4 Eq. 443.

(c) 6 Cruise T. 38, c. 12, § 32.

(d) See 1 *Jarm. Wills*, 2nd ed. 464—6, and *Smith's Executory Interests* annexed to *Fearne*, § 564, 564 a, 564 d. As to cases of a limitation over on an indefinite failure of issue of a prior taker, where there

is an express devise to his issue, sons, daughters, or children, see 2 *Jarm. Wills*, 2nd ed. c. 40; *Tinnes v. Wentworth*, 11 Moore 526; *Roddy v. Fitzgerald*, 6 H. L. Cas. 823. See also *Smith's Executory Interests* annexed to *Fearne*, § 569, 583. And as to cases of a limitation over on an indefinite failure of issue of a person to whom no express devise is made. see *Id.* § 585—9.

Pr. II T. 4.  
Ch. 2, s. 5.

Limitations  
over on  
failure of  
issue.

In cases of a limitation over on failure of issue, it is sometimes a question whether an indefinite failure of issue male or female, or issue in general is intended, or merely a failure of issue within a certain time. As regards real estate "no distinction exists between the words 'die without issue,' and 'die without leaving issue,' and 'in default,' or 'on failure,' and 'for want of issue'; but all those expressions, in devises made before the year 1838, are construed to import of themselves an indefinite failure of issue. But in the case of personal estate, bequeathed before the year 1838, while the words 'die without issue,' of themselves, are construed to import an indefinite failure of issue, the words 'die without leaving issue' are construed, in their natural and obvious sense of dying without leaving issue living at the death of the person the failure of whose issue is spoken of; because the construing them to refer to an indefinite failure of issue would not benefit the issue, in the case of personal estate, by implication in favour of the parent, in the same manner as that construction would, in the case of real estate" (a). 417.

By stat. 1 Vict. c. 26, s. 29, it is enacted, "that in any devise or bequest of real or personal estate, the words 'die without issue, or 'die without leaving issue,' or 'have no issue,' or any other words which may import either a want or failure of issue of any person in his lifetime or at the time of his death, or an indefinite failure of his issue, shall be construed to mean a want or failure of issue in the lifetime or at the time of the death of such person, and not an indefinite failure of his issue, unless a contrary intention shall appear by the will, by reason of such person having a prior estate tail, or of a preceding gift being,

(a) Smith's Executory Interests annexed to Fearn, § 538—9. For a number of other rules relating to this question, see *Id.* § 540—562.



without any implication arising from such words, a limitation of an estate tail to such person or issue, or otherwise : provided that this Act shall not extend to cases where such words as aforesaid import if no issue described in a preceding gift shall be born, or if there shall be no issue who shall live to attain the age or otherwise answer the description required for obtaining a vested estate by a preceding gift to such issue " (a). **418.**

Where, under a power of appointing to children only, and not to more remote descendants, an appointment is made by will to a child, remainder to his children in tail, who are not objects of the power, the child himself will take an estate tail, in order to effectuate the general intent (b). But such a construction is not adopted where the appointment is by a deed (c). **419.**

Any number of estates tail may be created in succession in the same hereditaments, and by the same deed, leaving an ultimate fee simple expectant on the last of such estates, which may either be disposed of by the same deed, or may be left undisposed of in the donor, and, like every other reversion, may be either retained by him and his heirs, or afterwards disposed of, either entirely, or partially, by carving less estates out of it. **420.**

In the case of an estate tail special, in some instances the estate tail vests in both the parents ; in other instances, in only one of the parents. And sometimes both parents are mentioned, but one only takes an estate tail. If the word heirs, or any other word of inheritance which may be used instead of the word heirs, is in terms applied to one only of the parents, the estate tail vests in that parent only. But if the word of inheritance is in terms applied to both the parents, or is not applied to one more than to

Pr. II. T. 4,  
Ch. 2, s. 5.

Estate tail  
under the  
cy pres  
doctrine, in  
cases of  
appoint-  
ment by  
will.

Several  
estates tail  
in succe-  
sion.

In whom  
an estate  
tail vests,  
where both  
husband  
and wife  
are men-  
tioned.

(a) See *Greenway v. Greenway*, pl. 4—10, pp. 56—61.

1 Gif. 131.

(c) Id. p. 61 ; Watk. Conv. 3rd

(b) 2 Sugd. Pow. c. 9, s. 1, ed. by Prest. 143.

Pr. H. T. 4.  
Ch. 2, s. 5.

the other of them, the estate tail vests in them both (a).

Thus, where lands are given to two persons who are husband and wife, and to the heirs of their two bodies begotten, both together take an estate tail. And the same is the case if they are single, or even if they are married, but not to each other; for they both take an estate tail, on account of the possibility that they may marry (b). And if land is given to a man and his wife, and to the heirs of the body of the man, the husband has an estate tail general, and the wife an estate for life. And if land is given to the husband and wife, and to the heirs of the husband which he shall beget on the body of his wife, the husband has an estate tail special, and the wife an estate for life only. And if a gift is made to the husband and wife, and to the heirs of the body of the wife by the husband begotten, the wife has an estate tail special and the husband a term for life only. But if lands are given to the husband and wife, and to the heirs which the husband shall beget on the body of the wife, both of them have an estate tail (c). 421.

What may  
be entailed.

With regard to what may be entailed, the only word used in the Statute de Donis is the word "tenement." But that is to be taken in its most comprehensive sense. Hence, all hereditaments of freehold tenure which savour of the realty may be entailed, whether they be corporeal or incorporeal; but things personal, whether they be chattels personal or chattels real, and an office which merely relates to personal chattels, and an annuity which charges only the person and not the lands of the grantor, cannot be entailed. Nor can an estate for another's life. The statute does not extend to copyhold hereditaments; but there is a special custom in many manors authorising the entail of

(a) See 4 Cruise T. 32, c. 21, § 29;

Co. Litt. 25 b.

1 Pres. Shep. T. 102, 103; Litt. s. 28; Co. Litt. 26 a.

(c) 4 Cruise T. 32, c. 21, § 28:

1 Pres. Shep. T. 102, 103; Litt.

(b) 4 Cruise T. 32, c. 21, § 26;

a. 26—29.

lands within those manors (a). A custom to create entails of copyholds may be said to exist wherever instances have occurred not merely of the limitation of estates to the heirs of the body, but of the alienation of the ancestor being defeated by the issue, or of a remainder being enjoyed upon the failure of issue (b). **422.**

Pr. II. T. 4,  
Ch. 2, s. 5.

Although estates pour autre vie are not within the Statute de Donis, and therefore cannot be entailed, yet they are sometimes limited to a person and the heirs of his body; and in such case he is a quasi tenant in tail; so that if he dies in the lifetime of the cestui que vie, without having disposed of the estate, it will devolve to the heirs of his body (c). **423.**

Quasi  
entails of  
estates pour  
autre vie.

"Chattels, whether real or personal, cannot be entailed, not being transmissible to the real representatives, as such, and not being within the Statute de Donis, even if they were so transmissible. Such being the case, 'it is a general rule, that, where the words would raise an estate tail in real estate, they will give the absolute property in personality' " (d). **424.**

Chattels  
cannot be  
entailed.

One mode of barring estates tail was by warranty; but warranties have long fallen into disuse, and are abolished by the statute 3 & 4 Will. 4, c. 74, s. 14 (e). **425.**

(a) 2 Bl. Com. 113; 1 Cruise T. 2, c. 1, § 27; Burton, § 646, 1284; Co. Litt. 20 a, and n. (5).

(b) Burton, § 1284, n.; Co. Litt. 19 b, 20 a, and n. (5), 60 b.

(c) Burton, § 732; Watk. Conv. 3rd ed. by Prest. 38.

(d) Smith's Executory Interests annexed to Fearn, § 593, 593 a. For a discussion on this subject, see Id. Part 2, ch. 19, 20; and see Watk. Conv. 3rd ed. by Prest. 26; 2 Jarm. Wills, 2nd ed. 479—494; *Lewis v. Hopkins*, 3 Drewry 668; *Beaver v. Novell*, 25 Beav. 551; *Re Andrew's Will*, 27 Beav. 608. See also *Wynck's Trusts*, 5 D. M. & G. 188;

*Jackson v. Calvert*, 1 Johns. & Hem. 235, which do not impugn the general rule above stated, but at most only establish an exception to it in the case of a limitation to a person for life, and after his death to his issue.

In *Wild's case*, 6 Rep. 16, it was laid down that when lands are devised to a person and his children, and he has no children at the time, he takes an estate tail. But Lord Chancellor *Campbell* held, that this rule has no application to personality. *Audsley v. Horn*, 1 D. F. & J. 226.

(e) The subject of warranties is

Pr. II. T. 4.  
Ch. 2, s. 5.

Alienation  
by tenant  
in tail  
before the  
stat. 3 & 4  
Will. 4,  
c. 74 (c).

Assurances  
by a tenant  
in tail  
under the  
stat. 3 & 4  
Will. 4,  
c. 74,

or the stat.  
42 Geo. 3,  
c. 116, s. 52.

Notwithstanding the Statute de Donis, a tenant in tail might always, by any ordinary and appropriate assurance alien or charge his estate, so far as to bind himself, and even so as to bind his issue, unless they entered to avoid such alienation or charge; except in the case of a limitation of an estate to commence after his own death, which was absolutely void in its creation; and except that when anything is granted by a tenant in tail out of land entailed (as a rent), such grant will be absolutely void upon the death of the grantor, unless the remainderman or reversioner in fee join in the grant, in which case it is good as against him, if the tenant in tail dies without issue (b). And, by certain modes of assurance (such as by a feoffment, fine, or recovery, under certain circumstances) (c), a tenant in tail in possession might alien or charge, and thereby bind himself; and he might also take away the right of entry of his issue, and of the remainderman and reversioner, unless the reversion were in the Crown, and reduce them to a right of action only, which effect is termed a discontinuance (d); and, under certain circumstances, a tenant in tail might, before the stat. 3 & 4 Will. 4, c. 74, by a fine or recovery, and he may now, by an enrolled conveyance under that Act, make an effectual alienation or charge, as against himself, his issue, and all claiming in remainder, reversion, or expectancy (e). 426.

By stat. 42 Geo. 3, c. 116, s. 52, tenants in tail are enabled, by deed indented and enrolled or registered, to

discussed in 2 Bl. Com. 300—3; 1 Steph. Com. 468—472; 4 Cruise T. 32, c. 24, § 11—47; Co. Litt. 365 a, n. (1), 373 b, n. (2); Watk. Conv. 3rd ed. by Prest. 68—70.

(a) As to the barring of entails in copyholds, see *infra*, Pt. III. T. 14.

(b) See 1 Cruise T. 2, c. 2, § 4, 5. 9, 12; Burton, § 671, 715; 2 Pres. Shep. T. 243, and n. (36); Watk.

Conv. 3rd ed. by Prest. 63.

(c) See Index, tit. Fines and Recoveries.

(d) See 1 Cruise T. 2, c. 2, § 6, 7. 8; Co. Litt. 525 a, et seq.; Burton. § 671—2, 674; *Anderson v. Anderson*, 30 Beav. 209. See *infra*, Part III. Tit. 6, c. 1.

(e) See *infra*, Part III. Tit. 12, c. 3, s. 8.

convey parts of their estates for the redemption of the land tax charged thereon (a). **427.**

Pr. II. T. 4.  
CH. 2, s. 5.

The effect of an alienation in fee by a tenant in tail, by an assurance which did not bar the issue in tail and those who were entitled in remainder, reversion, or expectancy, was to give the alienee a qualified or base fee commensurate with the estate tail; that is, an estate of inheritance, descendible to his heirs general, so long as the tenant in tail lived, or there was issue inheritable under the entail; but on the one hand, capable of being converted into an absolute fee simple by the act or default of the issue in tail, and those who were entitled in remainder, reversion, and expectancy; and on the other hand, subject to be defeated by the entry or action of any of those parties (b). **428.**

Creation of a base fee by a tenant in tail.

The issue in tail is not bound by his ancestor's contracts respecting the estate tail, unless the issue does any act towards carrying the contract or agreement into execution, or in any manner accepts it (c). And therefore, if a tenant in tail contracts to sell the trees growing on the inheritance, unless the vendee severs them during the life of the tenant in tail, the issue in tail will have a right to them as part of the inheritance (d). **429.**

Effect of contracts of ancestor on issue in tail.

A quasi tenant in tail in possession of an estate pour autre vie, whether he has issue or not, has complete power to bar the entail and the remainders over, by any act inter vivos, without any declaration of an intention so to do, even by a surrender made only with a view to obtain a renewal of the lease for life, or by articles of agreement to sell or settle the estate (e). For the purposes of alienation,

Alienation by a quasi tenant in tail of an estate pour autre vie.

(a) 1 Cruise T. 2, c. 2, § 48.

1 Jarm. & Byth. by Sweet, 579.

(b) See 1 Cruise T. 2, c. 2, § 10; Burton, § 715; 1 Pres. Shep. T. 107; Co. Litt. 331 a, n. (1); Watk. Conv. 3rd ed. by Prest. 63.

(d) 1 Jarm. & Byth. by Sweet, 579; 1 Cruise T. 2, c. 1, § 32.

(e) 1 Jarm. & Byth. by Sweet, 547—8; Burton, § 732; *Allen v. Allen*, 2 D. & W. 307.

(c) 1 Cruise T. 2, c. 2, § 18, 25, 26;

Pr. II. T. 4, he stands in the position of a person who has the whole estate and the absolute dominion. And the quasi entail and the remainders over will be barred, if a quasi tenant in tail in remainder concurs with the tenant for life in aliening the estate, or if the tenant for life procures a renewal, and then conveys to the quasi tenant in tail. But a quasi tenant in tail in remainder, without the concurrence of the tenant for life, cannot defeat the remainder, even if he can bar the entail (a). 430.

Stat. 45 & 46  
Vict. c. 38,  
s. 58. The  
Settled Land  
Act, 1882.  
Powers of a  
tenant in  
tail, etc.,  
under.

[By virtue of stat. 45 & 46 Vict. c. 38, s. 58 (Appendix), a tenant in tail, including a tenant in tail who is by Act of Parliament restrained from barring or defeating his estate tail, and although the reversion is in the Crown, and so that the exercise by him of his powers under that Act binds the Crown, but not including such tenant in tail where the land in respect whereof he is so restrained, was purchased with money provided by Parliament in consideration of public services, has, when his estate or interest is in possession, the powers of a tenant for life under that Act, and its provisions referring to a tenant for life either as conferring powers on him or otherwise, and to a settlement, and to settled land extend to such tenant in tail, and to the instrument under which his estate or interest arises, and to the land therein comprised (b).] 430a.

(a) *Allen v. Allen*, 2 D. & W. 307.

(b) See *infra*, par. 448c.

## TITLE V.

## OF FREEHOLDS NOT OF INHERITANCE.

FREEHOLDS, as we have seen, are, in the most comprehensive sense of the term, either freeholds of inheritance or freeholds not of inheritance. But the word freehold, simply, is now generally used to denote an estate for life, in opposition to an estate of inheritance (*a*). 431.

PART II.  
TITLE V.

Different  
senses of  
the term  
freehold,  
as denoting  
the quantity  
of interest.

A freehold not of inheritance, or an estate for life, in the more comprehensive sense of the term, is an estate that is created either by some legal instrument or by operation of law, to endure for a life or lives, or for some uncertain period which may last for a life or lives, but cannot last longer, and yet is not confined to a given number of years. 432.

Definition  
of a free-  
hold not of  
inheritance.

In illustration of this definition, it may be observed, that an estate for ninety-nine years if A. shall so long live, is not a freehold or an estate for life, but an interest less than freehold, a chattel real, a term for years ; because, although it is commensurate with the duration of a life, yet it is not for an uncertain period, but is confined to a given number of years. But the estate need not be expressly confined to a given number of years to constitute it a chattel interest ; for, if it is actually or virtually, though not expressly, confined to a given number of years, it is a chattel interest. Thus, if lands in lease at a fixed rent are granted to A. until he has received 100% out of the profits, the certainty of the period makes the interest a chattel (*b*);

Illustration.

(*a*) Co. Litt. 266 b, n. (1).

(*b*) Burton, § 726.

PART II.  
TITLE V.

for it is actually or virtually confined to a given number of years, to a number of years ascertained and defined at the time by the relative amount of the rent and the sum to be raised thereout. And so, if land is devised to executors for payment of debts and until debts be paid, they take but a chattel interest. And upon the same principle. tenants by statute merchant, statute staple, and elegit, have but chattel interests (*a*). 433.

Emble-  
ments.

A tenant for life, or his representatives, shall not be prejudiced by any determination of his estate, except by his own act; so that, if a tenant for his own life sows or plants the land, and dies before harvest, his executors shall have the emblements, or the annual artificial profits, as a compensation for the trouble and expense of tilling, manuring, and sowing the land, and for the encouragement of husbandry. The same is also the case if a life estate is determined by act of law, as where a lease for life is made to husband and wife during coverture, and they are divorced à vinculo matrimonii. So it is also if a person is tenant for the life of another, and cestui que vie, that is, the person on whose life the land is held, dies after the corn is sown (*b*). 434.

The under-tenants or lessees of a tenant for life represented him, and stood in his place; except that if he determined his estate by his own act, his under-tenants or lessees had the emblements (*c*). 435.

By the stat. 14 & 15 Vict. c. 25, s. 1, "where the lease or tenancy of any farm or lands held by a tenant at rackrent shall determine by the death or cesser of the estate of any landlord entitled for his life, or for any other uncertain interest, instead of claims to emblements, the tenant shall continue to hold and occupy such farm or lands until

(*a*) Co. Litt. 42 a, 43 b.(*b*) 3 Bl. Com. 122—3; Co.

Litt. 55 b.

(*c*) 2 Bl. Com. 124



the expiration of the then current year of his tenancy, and shall then quit, upon the terms of his lease or holding, in the same manner as if such lease or tenancy were then determined by effluxion of time or other lawful means during the continuance of his landlord's estate; and the succeeding landlord or owner shall be entitled to recover and receive of the tenant, in the same manner as his predecessor or such tenant's lessor could have done if he had been living or had continued the landlord or lessor, a fair proportion of the rent for the period which may have elapsed from the day of the death or cesser of the estate of such predecessor or lessor to the time of the tenant so quitting, and the succeeding landlord or owner and the tenant respectively shall, as between themselves and as against each other, be entitled to all the benefits and advantages, and be subject to the terms, conditions, and restrictions, to which the preceding landlord or lessor and such tenant respectively would have been entitled and subject in case the lease or tenancy had determined in manner aforesaid at the expiration of such current year: provided always, that no notice to quit shall be necessary or required by or from either party to determine any such holding and occupation as aforesaid." **436.**

PART II.  
TITLE V.

Freeholds not of inheritance, or estates for life in the more comprehensive sense of the term, are of four kinds:—

Different  
kinds of  
freeholds  
not of in-  
heritance.

- I. Estates for life, specifically so called.
- II. Estates tail after possibility of issue extinct.
- III. Estates by the curtesy.
- IV. Estates in dower, freebench, or jointure. **437.**

## CHAPTER I.

## OF ESTATES FOR LIFE SPECIFICALLY SO CALLED.

PART II.  
T. 5, CH. 1.

Definition  
of an estate  
for life  
specifically  
so called.

Different  
kinds of  
such estates.

Estate pour  
autre vie.

How estates  
for the  
life of the  
grantee or  
devisee, or  
of some  
other person  
or persons,  
may be  
created.

AN estate for life, specifically so called, is an estate that is created by some legal instrument, and is to endure for a life or lives, or for some uncertain period, which may last for a life or lives, and cannot last longer, and yet is not confined to any given number of years. 438.

Estates for life are of three kinds : estates for the life of the grantee or devisee ; estates for the life or lives of some other person or persons ; and estates for the life of the grantee or devisee, and for the life or lives of some other person or persons (a). An estate for the life or lives of some other person or persons is called an estate pour autre vie ; the grantee or devisee is called tenant pour autre vie ; and such other person or persons cestui que vie or cestuis que vie. 439.

The first two kinds of estates for life may be created not only by words expressive of the duration thereof, but also by a gift to a person indefinitely ; for, except in those particular cases already noticed, in which a fee simple will pass without the word heirs, if lands are conveyed to a natural person without any words of inheritance [and without the words in fee simple or in tail], he will take an estate for life only. And he will take for his own life, as being the highest and most beneficial estate which the terms of the conveyance will pass, unless the grantor is only tenant for his own life, or for the life of some other person, in which case the grantee will take an estate for the life for which the

grantor holds; or unless the grantor is only tenant in tail, in which case the grantee will take an estate for the life of the grantor only, as being the largest estate, capable of passing by the words, which the grantor has a right to give (*a*). And, with the exceptions already noticed, a similar rule applies to an indefinite devise prior to the year 1838 (*b*). **440.**

PART II.  
T. 5, CH. 1.

A life estate may also be created by necessary implication. **440a.** Thus:—

Life estate  
by impli-  
cation.

1. Where a testator devises to his heir apparent or heir presumptive, after the death of another to whom no express devise is made, such other person will take an estate for life by implication (*c*), unless the will contains a residuary devise (*d*); as he cannot, without the grossest absurdity, be supposed to mean to devise real estate to his heir, at the death of the other person, and yet that the heir should have it in the meantime, which would be to render the devise nugatory (*e*). **441.**

On a devise  
after death  
of another  
person, to  
testator's  
heir,

2. And, for the same reason, where there is a residuary devise, and the testator devises particular lands or the residuary realty to the residuary devisee, to take effect in possession on the decease of another person to whom no express devise thereof is made, it would seem that such other person will take an estate for life by implication (*f*). And so where a testator bequeaths the residue of his personalty to the residuary legatee, on the decease of another person to whom no bequest thereof is made, it would seem that such person will take an estate for life by implication (*g*). **442.**

or a resi-  
duary devise  
or bequest.

3. But where a testator devises to a person who is

Devise, after  
another's

(*a*) 2 Bl. Com. 121; 4 Cruise T. 22. c. 21, § 39; 1 Pres. Shep. T. 107; Co. Litt. 42 a, 183 b.

(*b*) See supra, par. 372—383.

(*c*) 1 Jarman on Wills, 2nd ed. 445—6.

(*d*) Id. 452.

(*e*) Id. 445.

(*f*) Id. 452; *Jepson v. Key*, 2 Hurl. & Colt. 873.

(*g*) *Humphreys v. Humphreys*, L. R. 4 Eq. 475.

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T. 5, CH. 1.

death, to a person who is neither heir nor residuary devisee.

Ecclesiastical persons and tenants of civil offices for their lives.

Estates for life which are subject to a contingent determination.

Alienation.

neither heir apparent, nor heir presumptive, nor residuary devisee, or to such a person along with others or another, after the death of A., no estate will arise to A. by implication; because it is *possible* to suppose, that intending the land to go to the heir during the life of A., he left it for that period undisposed of (a). 443.

Ecclesiastical persons, and all persons who are presented to any civil office, are quasi tenants for their own lives, unless the contrary is expressed in the form of donation (b). In the case of a parson or vicar, the fee simple is not vested in any man, but is in abeyance, that is, in consideration of law (c). 444.

There are some estates for life, which, as the definition implies, though they may last for life, and on that account are reckoned estates for life, may determine upon a contingency before the life expires. Thus, if an estate is granted to a woman during her widowhood, or to a man until he shall be promoted to a benefice, an estate for life is granted, determinable, however, in the lifetime of the widow by her second marriage, or in the lifetime of the man by his promotion to a benefice. And where an estate is granted to a man for his life generally, it may determine by his civil death [as formerly, if he entered a monastery, or was attainted, whereby he became dead in law. And now that there is no legal recognition of such establishments, and attainders are abolished, civil death may still be caused by outlawry]. But where an estate is granted "for the term of a man's natural life," it can only determine by his natural death (d). 445.

A tenant for life has the power of alienating his whole

(a) 1 Jarm. on Wills, 2nd ed. 445;

*Barnet v. Barnet*, 29 Beav. 239;

*Ralph v. Carrick*, L. R. 11 Ch. D.

(Ap.) 873.

(b) 2 Bl. Com. 123; 1 Cruise T.

3, c. 1, § 53; Co. Litt. 341 a, 342 a; Litt. 646—7.

(c) Co. Litt. 342 b.

(d) Co. Litt. 42 a; 2 Bl. Com.

121.

estate and interest, or of creating out of it any estate less than his own, unless he is restrained by apt words (*a*). **446.**

PART II.  
T. 5, CH. 1.

In order to assist such persons as have any estate in remainder, reversion, or expectancy, after the death of others, against fraudulent concealments of their deaths, it is enacted by the stat. 6 Anne, c. 18, that all persons on whose lives any lands or tenements are holden, shall (upon application to the Court of Chancery (*b*) and order made thereupon), once in every year, if required, be produced to the Court, or its commissioners; or, upon neglect or refusal, they shall be taken to be actually dead, and the person entitled to such expectant estate may enter upon and hold the lands and tenements till the party shall appear to be living (*c*). **447.**

Protection  
against  
fraudulent  
concealment  
of deaths of  
persons on  
whose lives  
estates are  
held.

The law gives every tenant for life, as incident to his estate, three kinds of estovers or botes: namely, house-bote, plough-bote, and hay-bote (*d*). These he may take upon the land without any assignment, unless restrained by special covenant. But they must be reasonable (*e*). **448.**

Estovers.

[The powers of tenants for life and other limited owners are considerably extended by recent statutes; thus by virtue of stat. 40 & 41 Vict. c. 18 (Appendix), s. 46, any person entitled to the possession or to the receipt of the rents and profits of any settled estates for an estate for any life, or for a term of years determinable with any life or lives, or for any greater estate, either in his own right or in right of his wife, when the settlement is made after the 1st of November, 1856 (the day on which the now repealed Act for facilitating leases and sales of settled estates came in force), and unless it contains an express declaration to

Stat. 40 & 41  
Vict. c. 18.  
The Settled  
Estates Act  
1877.  
Leases and  
sales.

(*a*) 1 Cruise T. 3, c. 1, § 32. See  
supra, par. 240.

(*c*) 2 Bl. Com. 177.

(*d*) See supra, par. 125.

(*b*) Now the Chancery Division  
of the High Court of Justice.

(*e*) Co. Litt. 41 b.

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[the contrary, may, and also any person entitled to the possession or to the receipt of the rents and profits of any unsettled estates as tenant by the curtesy, or in dower, or in right of a wife who is seised in fee, may, without application to the Court, demise the same or any part thereof, except the principal mansion house (a) and the demesnes thereof, and other lands usually occupied therewith, from time to time, for any term not exceeding twenty-one years as to estates in England, and thirty-five years as to estates in Ireland, to take effect in possession at or within one year next after the making thereof; but subject to certain provisoes contained in that section. Also under the same Act the Chancery Division of the High Court of Justice may, on due application, in accordance with the provisions of the Act, authorise leases and sales (b) of the settled estates, and the dedication of part thereof for streets, roads, and other purposes specified in the Act. **448a.**

Stat. 45 & 46  
Vict. c. 38.  
The Settled  
Land Act,  
1882.  
Definitions.  
Settlement.

And the more recent stat. 45 & 46 Vict. c. 38 (Appendix) (which came into operation on the 1st of January, 1883), defines settlement, settled land, and tenant for life, by enacting, s. 2—“(1) Any deed, will, agreement for a settlement, or other agreement, covenant to surrender, copy of court roll, act of parliament, or other instrument, or any number of instruments, whether made or passed before or after, or partly before and partly after, the commencement of this Act, under or by virtue of which instrument or instruments any land, or any estate or interest in land, stands for the time being limited to or in trust for any persons by way of succession, creates or is for purposes of this Act a settlement, and is in this Act referred to as a settlement, or as the settlement as the case requires. (2) An estate or interest in remainder or

(a) *Re The Duchess of Cleveland's Settled Estates*, 22 W. R. 818.

(b) *In re Barber's Settled Estates*, L. R. 18 Ch. D. 624.

[reversion not disposed of by a settlement, and reverting to the settlor or descending to the testator's heir, is for purposes of this Act an estate or interest coming to the settlor or heir under or by virtue of the settlement, and comprised in the subject of the settlement. (3) Land, <sup>Settled land.</sup> and any estate or interest therein, which is the subject of a settlement, is for purposes of this Act settled land, and is, in relation to the settlement, referred to in this Act as the settled land. (4) The determination of the question whether land is settled land, for purposes of this Act, or not, is governed by the state of facts, and the limitations of the settlement, at the time of the settlement taking effect. (5) The person who is, for the time being, under a settlement, beneficially entitled to possession of settled land, for his life, is for purposes of this Act the tenant for life of that land, and the tenant for life under that settlement. (6) If, in any case, there are two or more persons so entitled as tenants in common, or as joint tenants, or for other concurrent estates or interests, they together constitute the tenant for life for purposes of this Act. (7) Any person being tenant for life within the foregoing definitions shall be deemed to be such notwithstanding that, under the settlement or otherwise, the settled land, or his estate or interest therein, is incumbered or charged in any manner or to any extent" (a). And by the same section, "(10) (i.) land includes incorporeal hereditaments, also <sup>Land.</sup> an undivided share in land ; income includes rents and profits ; and possession includes receipt of income." For further definitions see the Act in the Appendix. 448b.

Under s. 3 of that Act "A tenant for life (i.) may sell (b) <sup>Sale.</sup> the settled land, or any part thereof, or any easement, right, or privilege of any kind, over or in relation to the same ; and (ii.) Where the settlement comprises a <sup>Enfranchisement.</sup>

(a) *Re Wells*, 31 W. R. 764 ; *Re Jones' Estate*, L. R. 24 Ch. D. 588. (b) *Wheelwright v. Walker*, L. R. 28 Ch. D. 752.

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[manor, may sell the seignory of any freehold land within the manor, or the freehold and inheritance of any copyhold or customary land, parcel of the manor, with or without any exception or reservation of all or any mines or minerals, or of any rights or powers relative to mining purposes, so as in every such case to effect an enfranchisement; and (iii.) May make an exchange of the settled land, or any part thereof, for other land, including an exchange in consideration of money paid for equality of exchange; and (iv.) Where the settlement comprises an undivided share in land, or, under the settlement, the settled land has come to be held in undivided shares,—may concur in making partition of the entirety, including a partition in consideration of money paid for equality of partition;” but these powers are subject to the regulations contained in s. 4. On a sale, exchange, or partition of settled land, the tenant for life may transfer incumbrances affecting the land sold or given in exchange, or on partition, to any other part of the settled land (s. 5). He may also mortgage the settled land, or any part thereof, either in fee, or for the estate or interest the subject of the settlement, or for a term, or otherwise, in order to raise money required for enfranchisement or for equality of exchange or partition (s. 18). **448c.**

Also by s. 6 of the same Act “A tenant for life may lease the settled land, or any part thereof, or any easement, right, or privilege of any kind, over or in relation to the same, for any purpose whatever, whether involving waste or not, for any term not exceeding (i.) In case of a building lease, ninety-nine years; (ii.) In case of a mining lease, sixty years; (iii.) In case of any other lease, twenty-one years.” And by s. 7, “(1) Every lease shall be by deed, and be made to take effect in possession not later than twelve months after its date. (2) Every lease shall reserve the best rent that can reasonably be obtained,

Exchange.

Partition.

Transfer  
of incum-  
brances.

Mortgage  
for equality  
money, etc.

Building  
lease.  
Mining  
lease.  
Ordinary  
lease.

Regulations  
respecting  
leases  
generally.



[regard being had to any fine taken, and to any money laid out or to be laid out for the benefit of the settled land, and generally to the circumstances of the case. (3) Every lease shall contain a covenant by the lessee for payment of the rent, and a condition of re-entry on the rent not being paid within a time therein specified not exceeding thirty days. (4) A counterpart of every lease shall be executed by the lessee and delivered to the tenant for life ; of which execution and delivery the execution of the lease by the tenant for life shall be sufficient evidence. (5) A statement contained in a lease or in an indorsement thereon, signed by the tenant for life, respecting any matter of fact or of calculation under this Act in relation to the lease, shall in favour of the lessee and of those claiming under him, be sufficient evidence of the matter stated." But building and mining leases are subject to the regulations contained in ss. 8, 9, 10, and 11. **448a.**

PART II.  
T. 5, CH. 1.

Regulations  
respecting  
building  
and mining  
leases.

Leasing  
powers for  
special  
objects.

The leasing power of a tenant for life under that Act is extended by s. 12 "To the making of—(i.) a lease for giving effect to a contract entered into by any of his predecessors in title for making a lease, which, if made by the predecessor, would have been binding on the successors in title ; and (ii.) a lease for giving effect to a covenant of renewal, performance whereof could be enforced against the owner for the time being of the settled land ; and (iii.) a lease for confirming, as far as may be, a previous lease, being void or voidable ; but so that every lease, as and when confirmed, shall be such a lease as might at the date of the original lease have been lawfully granted, under this Act, or otherwise, as the case may require." A tenant for life may also accept, with or without consideration, a surrender of any lease of settled land, whether made under that Act or not, in respect of the whole or part of the land leased, and with or without an exception of, or in respect of, mines and minerals ; and on

Surrender  
and new  
grant of  
lease.

PART II.  
T. 3, CH. 1.

[a surrender may make of the land or mines or minerals surrendered, or of any part thereof, a new or other lease, or new or other leases in lots, but every new or other lease must be in conformity with that Act (s. 13). And a tenant for life of a manor comprised in a settlement may grant to the copyholders, and customary tenants thereof, licences for leasing (s. 14). 448e.

Restriction  
as to man-  
sion house,  
demesnes  
and lands  
occupied  
therewith.

An important restriction, however, is placed on the exercise of the powers given by the preceding sections of the Act, for it is enacted that "notwithstanding anything in this Act, the principal mansion house on any settled land, and the demesnes thereof, and other lands usually occupied therewith, shall not be sold or leased by the tenant for life, without the consent of the trustees of the settlement, or an order of the Court" (s. 15). This is similar to the exception contained in stat. 40 & 41 Vict. c. 18 (a), with respect to the mansion house and demesnes, and lands occupied therewith. A power to charge the settled estate with the expense of the erection, or improvement of, or an addition to, a mansion house is given by stats. 33 & 34 Vict. c. 56, and 34 & 35 Vict. c. 34. 448f.

Appropri-  
ation for  
streets, open  
spaces, etc.

The tenant for life is also empowered by the Act, on or in connection with a sale or grant for building purposes, or a building lease, and for the general benefit of the residents on the settled land, or on any part thereof, to cause or require any parts of the settled land to be appropriated and laid out for streets, roads, paths, squares, gardens, or other open spaces, for the use, gratuitously or on payment, of the public or of individuals, with proper works in connection therewith, and to provide that the parts so appropriated may be conveyed to or vested in the trustees of the settlement, or other trustees, or any company or public body, with provisions for securing such

(a) See supra, par. 448a

[appropriation, and for repairs and maintenance, and for such purposes to execute any necessary or proper deed, which may be enrolled in the central office of the Supreme Court of Judicature (s. 16). He may deal separately with the surface of the land, and the minerals with or without way-leaves (s. 17). **448g.**

With respect to the completion of transactions under the Act, it is enacted by s. 20—“(1) On a sale, exchange, partition, lease, mortgage, or charge, the tenant for life may, as regards land sold, given in exchange or on partition, leased, mortgaged, or charged, or intended so to be, including copyhold or customary or leasehold land vested in trustees, or as regards easements or other rights or privileges sold or leased, or intended so to be, convey or create the same by deed, for the estate or interest the subject of the settlement, or for any less estate or interest, to the uses and in the manner requisite for giving effect to the sale, exchange, partition, lease, mortgage, or charge. (2) Such a deed, to the extent and in the manner to and in which it is expressed or intended to operate and can operate under this Act, is effectual to pass the land conveyed, or the easements, rights, or privileges created, discharged from all the limitations, powers, and provisions of the settlement, and from all estates, interests, and charges subsisting or to arise thereunder, but subject to and with the exception of—(i.) all estates, interests, and charges having priority to the settlement; and (ii.) all such other, if any, estates, interests, and charges as have been conveyed or created for securing money actually raised at the date of the deed; and (iii.) all leases and grants at fee-farm rents or otherwise, and all grants of easements, rights of common, or other rights or privileges granted or made for value in money or money's worth, or agreed so to be, before the date of the deed, by the tenant for life, or by any of his predecessors in title, or by any

PART II.  
T. 5, CH. 1.

Completion  
of sale,  
lease, etc.,  
by deed.

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T. 5, CH. 1.

[trustees for him or them, under the settlement, or under any statutory power, or being otherwise binding on the successors in title of the tenant for life." The capital money under the Act must be invested, etc., as therein provided (ss. 21—24, etc.). 448a.

Improvements.

The Act authorizes the making or execution, on or in connection with, or for the benefit of the settled land, of numerous improvements therein specified (s. 25). Where the tenant for life is desirous that capital money arising under the Act, should be applied in payment of any such improvements he may submit for approval to the trustees of the settlement, or to the Court, as the case may require a scheme for the execution of the improvements showing the proposed expenditure thereon; and after approval of the scheme by the trustees, or by the Court, the money may be applied in payment of the improvements in the manner specified in the Act (s. 26). The tenant for life may concur with any other person in executing any such improvements or contributing to the costs thereof (s. 27).

Obligation of tenant for life and successors to maintain and insure improvements.

The tenant for life and each of his successors in title having, under the settlement, a limited estate or interest only in the settled land is bound, during such period, if any, as the land commissioners prescribe, at his own expense to maintain, repair, and, if insurable, insure the improvements against fire, and on default, any person having, under the settlement, any estate or interest in the settled land, in possession, remainder, or reversion, has a right of action against the tenant for life; and the estate of the tenant for life, after his death, is liable for damages (s. 28). There is no liability for waste consequent upon the execution and repair of improvements (s. 29). The Improvement of Land Act, 1864, is extended to include improvements authorized by this Act (s. 30). 448a.

Extension of 27 & 28 Vict. c. 114.

Power for tenant for life to enter into contracts.

A tenant for life is also empowered by the same Act to make various contracts therein specified, for it is provided.

[by s. 31, "(1) A tenant for life (i.) May contract to make any sale, exchange, partition, mortgage, or charge ; and (ii.) May vary or rescind, with or without consideration, the contract, in the like cases and manner in which, if he were absolute owner of the settled land, he might lawfully vary or rescind the same, but so that the contract as varied be in conformity with this Act ; and any such consideration, if paid in money, shall be capital money arising under this Act ; and (iii.) May contract to make any lease ; and in making the lease may vary the terms, with or without consideration, but so that the lease be in conformity with this Act ; and (iv.) May accept a surrender of a contract for a lease, in like manner and on the like terms in and on which he might accept a surrender of a lease ; and thereupon may make a new or other contract, or new or other contracts, for or relative to a lease or leases in like manner and on the like terms in and on which he might make a new or other lease or new or other leases, where a lease had been granted ; and (v.) May enter into a contract for or relating to the execution of any improvement authorized by this Act, and may vary or rescind the same ; and (vi.) May, in any other case, enter into a contract to do any act for carrying into effect any of the purposes of this Act, and may vary or rescind the same. (2) Every contract shall be binding on and shall enure for the benefit of the settled land, and shall be enforceable against, and by every successor in title for the time being of the tenant for life, and may be carried into effect by such successor ; but so that it may be varied or rescinded by any such successor, in the like case and manner, if any, as if it had been made by himself." 448k.

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T. 5, CH. 1.

The powers conferred by the Act on the tenant for life are not capable of assignment or release, and do not pass to a person as being by operation of law or otherwise an

Character  
of powers of  
a tenant  
for life  
under the  
Act.

PART II.  
T. 5, CH. 1.

[assignee of the tenant for life ; and a contract by him not to exercise any of his powers under the Act, is void ; but the rights of an assignee for value of the estate or interest of the tenant for life, cannot be affected without the consent of such assignee, except that, unless such assignee is actually in possession, his consent is not requisite for the making of leases at rack rent and in conformity with the Act, by the tenant for life ; and this extends to any assignment by way of mortgage or charge (s. 50). Any provision or limitation to prevent the tenant for life from exercising his powers under the Act, is void (s. 51). Notwithstanding anything in the settlement the exercise by the tenant for life, of any power under the Act, does not occasion a forfeiture (s. 52). These powers must be exercised in accordance with the limitations and provisions of sections 55—57, and purchasers, lessees, and mortgagees from a tenant for life are protected by section 54. **448a.**

Purchasers,  
etc., from  
tenant for  
life pro-  
tected.

Tenant for  
life trustee  
for all  
parties  
interested.

A tenant for life, must, in exercising any power under the Act, regard the interests of all parties entitled under the settlement, and in relation to the exercise thereof by him, is deemed to be in the position, and to have the duties and liabilities of a trustee for those parties (s. 53). **448m.**

Limited  
owners who  
have powers  
of tenant  
for life.

A tenant for years determinable on life, not holding merely under a lease at a rent ; a tenant for the life of another, not holding merely under a lease at a rent ; a tenant for his own or any other life, or for years determinable on life, whose estate is liable to cease in any event during that life, whether by expiration of the estate, or by conditional limitation or otherwise, or to be defeated by an executory limitation, gift, or disposition over, or is subject to a trust for accumulation of income for payment of debts or other purpose ; a person entitled to the income of land, under a trust or direction for payment thereof to him during his own or any other life, whether subject to expenses of management or not, or until sale of the land,

[or until forfeiture of his interest therein on bankruptcy or other event, have, under the same Act, the powers of a tenant for life (s. 58). **448n.**

In connection with this it may also be mentioned that under stat. 45 & 46 Vict. c. 21 (Appendix), any person seised or entitled only for life or lives of or to any manor or lands of freehold tenure, in cases where the person next entitled for a beneficial interest in remainder in fee simple or fee tail is unborn or unascertained, is authorised to make a grant, conveyance, or enfranchisement of a piece of land not exceeding one acre, for a site for a place of religious worship, and for a burial place, as provided by stat. 36 & 37 Vict. c. 50 (a).] **448o.**

PART II.  
T. 5, CH. 1.  
  
Stat. 45 & 46  
Vict. c. 21.  
The Places  
of Worship  
Sites  
Amendment  
Act, 1882.  
  
Powers of  
tenant for  
life, or lives,  
under, to  
grant, etc.

(a) See *infra*, par. 811a.

## CHAPTER II.

OF AN ESTATE TAIL AFTER POSSIBILITY OF ISSUE  
EXTINCT.PART II.  
T. 5, CH. 2.Definition  
of an estate  
tail after  
possibility  
of issue  
extinct.

Examples.

AN estate tail after possibility of issue extinct, is an estate which the law creates in favour of the survivor, where an estate tail special is given to a man and woman, or to a man or woman, and in the first case, either of them, or, in the second case, the party who is not tenant in tail, but by or on whom the issue is to be begotten, dies, and at the time of the death of such person, or afterwards in the lifetime of the survivor, there happens to be a failure of issue inheritable under the entail. Thus, if an estate is given to a man and his wife and the heirs male of their bodies, and either of them dies without male issue of the marriage, or, having such issue, such issue afterwards dies without issue male in the lifetime of the survivor, such survivor becomes tenant in tail after possibility of issue extinct. And so if an estate is given to a man and the heirs of his body by his present wife, or to a woman and the heirs of her body by her present husband, and, in the first case, the wife dies, or in the second case the husband dies, in case of a failure of issue of the marriage in the lifetime of the survivor, such survivor becomes tenant in tail after possibility of issue extinct (*a*). 449.

Where this  
estate arises.

It will appear from the definition, 1. That this estate can only arise where an estate tail special is created. 2. That it can only arise by death; and not by advanced age; nor by any limitation; nor by any human act, such as a

(*a*) See Litt. § 32, 33, 34; 2 Bl. Com. 124—6; 1 Cruise T. 4, § 1—3.



PART II.  
T. 5, CH. 2.

divorce à vinculo matrimonii. By such a divorce, a tenant in special tail becomes a bare tenant for life (a). 3. That it may arise by the death of a tenant in special tail, where the survivor is also tenant in tail under the same entail; but that it cannot arise by the death of a sole tenant in special tail; for it is in reality rather a reduction of an old estate in special tail to a privileged estate for life, than the creation of an entirely new estate; so that the survivor, in order to be tenant in tail after possibility of issue extinct, must in the first instance have been tenant in special tail. 4. That a person will have this estate only, and not an estate tail, although he have issue, if the issue are not such as are capable of inheriting under the entail; as, where the estate is in tail male, and the issue are females, or males not descended from the tenant in tail wholly through males, or where the issue are by some other husband or wife than the one by or on whom the issue is, according to the terms of the entail, to be begotten. 450.

[Under the provisions of stat. 45 & 46 Vict. c. 38, s. 58 (Appendix), a tenant in tail after possibility of issue extinct, when his estate or interest is in possession, has the powers of a tenant for life under that Act, and its provisions referring to a tenant for life, either as conferring powers on him or otherwise, and to a settlement, and to settled land extend to a tenant in tail after possibility of issue extinct, and to the instrument under which his estate or interest arises, and to the land therein comprised.] 450a.

Stat. 45 & 46  
Vict. c. 38,  
The Settled  
Land Act,  
1882.

Power of a  
tenant in  
tail after  
possibility  
of issue  
extinct  
under.

## CHAPTER III.

## OF AN ESTATE BY THE CURTESY.

PART II.  
T. 3, CH. 3.

Definition  
of this  
estate.

AN estate by the curtesy of England, is an estate for life to which a man becomes entitled on the decease of his wife, in lands or tenements, of which she was seised, or to which she was equitably entitled, otherwise than in joint tenancy, for any estate of inheritance, in possession, or subject only to a term of years, provided he has had by her issue born alive, and capable of inheriting her estate. **451.**

Requisites.

There are, therefore, four requisites to the existence of an estate by the curtesy : 1. **Marriage.** 2. **Legal seisin or equitable ownership by the wife for an estate of inheritance, in possession, or subject only to a term for years.** 3. **Issue born alive in the wife's lifetime, and capable of inheriting her estate.** 4. **The death of the wife in the husband's lifetime (a).** **452.**

1. As to  
marriage.

1. If the marriage is only voidable, and is not annulled during the life of the wife, the husband will be tenant by the curtesy (b). **453.**

2. As to  
seisin, or  
equitable  
ownership.

2. It is necessary, in certain cases, that the seisin of the wife should be of the most perfect kind. And, in all cases, it is indispensable that she should be seised, or equitably entitled, for an estate of inheritance of some

(a) Co. Litt. 29 a, b ; 2 Bl. 15, 17.  
Com. 127 ; 1 Cruise T 5, c 1, § 4, (b) 1 Cruise T. 5, c. 1. § 5.

kind, in possession (a), or subject only to a term of years, and in such things whereof curtesy may be had, and not in joint tenancy (b). 454.

PART II.  
T. 5, CH. 3.

The preponderance of authority now is, that where a married woman has an equitable estate of inheritance to her separate use, and does not dispose of it by deed or will, her husband is entitled to curtesy. Where she does so dispose of it, her husband is debarred from any estate by the curtesy (c). 455.

All corporeal hereditaments are liable to curtesy; and of these an actual seisin, and not a mere constructive seisin, is necessary, unless the estate of the wife is only an equitable estate not settled to her separate use. So that, if an heiress dies before she or her husband has entered, the husband shall not be tenant by the curtesy. But if her husband had entered before her death, it would have sufficed (d). 456.

Corporeal  
heredita-  
ments.

A person cannot be tenant by the curtesy of a remainder or reversion expectant upon an estate of freehold, unless the particular estate be determined during the coverture, except perhaps in the case of a lease for life whereon rent is reserved. But a man is entitled to curtesy of a reversion expectant on an estate for years; because the wife is seised of the immediate freehold, though subject to the term (e). 457.

Remainders  
or rever-  
sions.

Some incorporeal hereditaments, such as advowsons, tithes, commons, and rents, are liable to curtesy (f).

Incorporeal  
heredita-  
ments.

(a) *Gibbins v. Eyden*, L. R. 7 Eq. 371.

(b) As to joint tenancy, see Tit. 7, c. 1.

(c) *Cooper v. Macdonald*, L. R. 7 Ch. D. 288, aff. on appeal; *Eager v. Furnivall*, L. R. 17 Ch. D. 115.

(d) 1 Cruise T. 5, c. 1, § 6; and T. 12, c. 2, § 12, 14; Co. Litt. 29 a, and n. 6; Watk. Conv. 3rd ed. by Prest. 55.

(e) 1 Cruise T. 5, c. 1, § 13; c. 2, § 23; 2 Bl. Com. 127; Co. Litt. 29 a.

(f) 1 Cruise T. 5, c. 2, § 16.

PART II.  
T. 5, CH. 3.

And of these a constructive seisin, commonly called a seisin in law, is sufficient; because in many cases it may be impossible to obtain any other seisin (a). 458.

Money  
agreed or  
directed to  
be laid out  
in the  
purchase of  
land.

As it is a rule in equity, that money agreed or directed to be laid out in the purchase of land shall be considered as land, to all intents and purposes, so a man may be tenant by the curtesy of money agreed or directed to be laid out in the purchase of land (b). 459.

Estate pour  
autre vie.

Curtesy is not incident to an estate pour autre vie (c). 460.

3. As to the  
issue.

3. The issue must be born during the life of the mother: for, if the mother dies in labour, and the cæsarion operation is performed, the husband shall not be tenant by the curtesy; because at the instant of the mother's death, he was not entitled, as having no issue born, but the land descended to the child while he was yet in his mother's womb; and the estate being once so vested shall not afterwards be taken from him (d). This is an absurd and cruel refinement. 461.

The issue must also be capable of inheriting the mother's estate. Therefore, if a woman is tenant in tail male, and has only a daughter, the husband is not entitled to be tenant by the curtesy (e). And where land is devised to a woman and her heirs, but if she should die leaving issue, then to her child or children, and his, her, or their heirs and assigns, if more than one child, to take as tenants in common; her husband is not entitled to be tenant by the curtesy, because the estate of the wife determines on her dying leaving issue, and the children then take as pur-

(a) Co. Litt. 29 a; 3 Cruise T. 28, c. 2, § 10.

(b) 1 Cruise T. 5, c. 2, § 13; 1 Jarm. Wills 2nd ed. 494.

(c) *Stead v. Platt*, 18 Beav. 50.

(d) 2 Bl. Com. 127; Co. Litt. 29 b.

(e) Co. Litt. 29 b; 2 Bl. Com. 128.

chasers by force of the gift over, and not by descent from her (a). **462.**

PART II.  
T. 5, CH. 3.

It is immaterial, whether the issue be born before or after the seisin of the wife ; nor does it matter if the issue dies before the seisin of the wife (b). And, although a woman have issue by a former husband, yet if her second husband has issue by her, he shall be tenant by the curtesy ; because his issue by possibility may inherit, if the first issue should die without issue (c). **463.**

4. Although the estate of a tenant by the curtesy is not consummate until the death of the wife, yet it commences previously for some purposes (d). Thus, the husband, from the moment of the child's birth or of the acquisition of the property to the wife (whichever last happens), is enabled to convey an estate for his own life to another person. Before the birth of a child, he can convey a good estate for the joint lives only of himself and his wife (e). **464.**

4. Com-  
mencement  
of this  
estate.  
Power of  
alienation.

No entry is necessary to complete this estate ; for, on the death of the wife, the law adjudges the freehold to be in the husband immediately (f). **465.**

No entry  
necessary.

Curtesy is an incident so inseparably annexed to an estate of inheritance in hereditaments of freehold tenure, that it cannot be restrained by any proviso or condition whatever (g). **466.**

Curtesy an  
inseparable  
incident.

Curtesy is not incident to copyholds, unless there be a special custom to warrant it. Where a custom of this kind prevails, it is construed strictly, and not extended to cases to which it does not precisely apply (h). When it is incident, it is considered as a continuation of the estate

Curtesy  
the case  
of copy-  
holds.

(a) *Barker v. Barker*, 2 Sim. 253.

3rd. ed. by Prest. 54.

(b) 1 Cruise T. 5, c. 1, § 7, 18 ;

(f) 1 Cruise T. 5, c. 2, § 28.

2 Bl. Com. 128 ; Co. Litt. 29 b.

(g) 1 Cruise T. 1, § 48, 52 ; and

(c) 1 Cruise T. 5, c. 1, § 20.

T. 5, c. 2, § 10.

(d) Co. Litt. 30 a.

(h) 1 Cruise T. 10, c. 3, § 49 ;

(e) Burton, § 350 ; Watk. Conv.

Burton, § 1311.

PART II.  
T. 5, CH. 3.

of the wife, and therefore as perfect without admittance (a). And although the wife be not actually admitted to the copyhold, yet the husband will be entitled to curtesy (b). And by the custom of some manors the husband of a copyholder is entitled to curtesy, though he has no issue by his wife. But such estate is forfeitable by a second marriage (c). 467.

or of gavel-  
kind lands.

In gavelkind lands, a husband may be tenant by the curtesy without having any issue. But he has only a moiety of the wife's lands, and he loses his estate if he marries again (d). 468.

When  
curtesy and  
dower cease.

Where the fee is evicted by a title paramount, both curtesy and dower necessarily cease. So where the donor enters for breach of a condition, the right to curtesy and dower is defeated. And so where a person seised in fee tail or any other determinable fee conveys in fee, the dower of the wife or the curtesy of the husband of the grantee ceases, if the grantor's estate is determined. For it would be unreasonable that a person having a limited estate should, virtually, as regards the postponement of enjoyment by the remainderman or reversioner, create a derivative estate to endure beyond the limits of his own estate. But dower or curtesy of an estate tail does not cease on the expiration of the estate tail through failure of issue. And where an estate in fee simple is made determinable upon some particular event, if that event happens, curtesy and dower do not cease with the estate (e). 469.

Stat. 40 & 41  
Vict. c. 18.  
The Settled  
Estates Act,  
1877.

[Under stat. 40 & 41 Vict. c. 18 (Appendix), a tenant by the curtesy has the same powers of granting leases,

(a) Burton, § 1311.

(b) 1 Cruise T. 10, c. 3, § 51.

(c) 1 Cruise T. 10, c. 3, § 53.

(d) Co. Litt. 30 a, and n. 1; 2 Bl. Com. 128; Watk. Conv. 3rd ed.

by Prest. 55.

(e) 1 Cruise T. 6, c. 2, § 24; and 6 Cruise T. 38, c. 17, § 27; Co. Litt.

241 a, n. (4), III. VI.: 1 Jarm. Wills, 2nd ed. 746.

and of selling, as a tenant for life ; and it is provided by stat. 45 & 46 Vict. c. 38, s. 58 (Appendix), that a tenant by the curtesy shall, when his estate or interest is in possession, have the powers of a tenant for life under that Act, and that its provisions referring to a tenant for life, either as conferring powers on him or otherwise, and to a settlement, and to settled land, shall extend to a tenant by the curtesy, and to the instrument under which his estate or interest arises, and to the land therein comprised.] **469a.**

PART II.  
T. 5, CH. 3.  
—  
Stat. 45 & 46  
Vict. c. 38.  
The Settled  
Land Act,  
1882.  
Powers  
of tenant  
by the  
curtesy  
under.

## CHAPTER IV.

## OF DOWER, FREEBENCH, AND JOINTURE.

## SECTION I.

*Of Dower generally.*

Pr. II. T. 5,  
Ch. 4, s. 1.

Definition  
of this  
estate in  
cases not  
within the  
Dower Act

DOWER, in cases not within the Dower Act, is an estate for life, to which (where it is not prevented, barred, or lost) a woman becomes entitled, on the decease of her husband, in one-third of the lands and tenements of which he was seised in deed or in law, at any time during the coverture, for any estate of inheritance in possession otherwise than in joint tenancy, and which any issue which she might have had, might by possibility have inherited (*a*). **470.**

Definition  
of this  
estate in  
cases  
within the  
Dower Act.

Dower, in cases within the Dower Act, is an estate for life, to which (where it is not prevented, barred, or lost) a woman becomes entitled, on the decease of her husband, in one-third of the lands and tenements to which he died legally or equitably entitled, for any estate of inheritance in possession otherwise than in joint tenancy, and which any issue which she might have had, might by possibility have inherited. **471.**

Dower in  
gavelkind  
land.

By the custom of gavelkind the widow is entitled to a moiety, but only during her widowhood. And by the custom of some places the widow is entitled to the whole (*b*). **472.**

(*a*) See Litt. s. 36—7; 2 BL Com. 129; Co. Litt. 31 a; 1 Cruise T. 6, c. 2. § 1, 3, 6; Burton, § 349; Watk. Conv. 3rd ed. by Prest. 41.

(*b*) Burton, § 349; Watk. Conv. 3rd ed. by Prest. 53; Litt. s. 37; Co. Litt. 33 b. n. (11).



Besides dower at the common law, and by particular custom, there were two other species of dower, called dower ad ostium ecclesiæ, and dower ex assensu patris. But these are abolished by the stat. 3 & 4 Will. 4, c. 105, s. 13. **473.**

Pr. II. T. 5,  
Ch. 4, s. 1.

Dower ad  
ostium  
ecclesiæ and  
ex assensu  
patris.

The wife of a tenant in tail is dowable, though the estate tail determines by failure of issue, if any issue by her would have been capable of inheriting the estate tail. This is an exception to the rule, cessante statu primitivo cessat et derivativus (a). **474.**

Dower of  
entailed  
estate.

By the old law, a woman was not entitled to dower of an equitable estate (b). But by sect. 2 of the stat. 3 & 4 Will. 4, c. 105, it is enacted, "That when a husband shall die beneficially entitled to any land, for an interest which shall not entitle his widow to dower out of the same at law, and such interest whether wholly equitable or partly legal and partly equitable, shall be an estate of inheritance in possession, or equal to an estate of inheritance in possession (other than an estate in joint tenancy), then his widow shall be entitled in equity to dower out of the same land." And this applies to gavelkind lands as well as to others (c). **475.**

Dower of  
an equitable  
estate.

Before the passing of the stat. 3 & 4 Will. 4, c. 105, it was absolutely necessary that the husband should be seised; but a seisin in law was sufficient, because otherwise the wife might have been deprived of her dower by the neglect or design of her husband (d). And it was not necessary that the seisin should continue; for if the husband aliened the land or tenement, or extinguished the rents or commons, etc., still the wife was endowed (e). But the necessity of seisin is now dispensed with in the

Necessity  
for seisin  
of the  
husband

(a) Co. Litt. 31 b, 241 a, n. (4),  
IV.; Watk. Conv. 3rd ed. by Prest.  
53.

(c) *Farley v. Bonham*, 2 Johns.  
& Hem. 177.

(b) Co. Litt. 29 a, n. (6), 290 b,  
n. (1); 1 Cruise T. 6, c. 2, § 23.

(d) 1 Cruise T. 6, c. 1, § 19; Co.  
Litt. 31 a.

(e) Co. Litt. 32 a.

Pr. II. T. 5.  
Ch. 4, s. 1.

case of widows who were not married on or before the 1st of January, 1834. For, by sect. 3 of the Dower Act, it is enacted, "That, when a husband shall have been entitled to a right of entry or action in any land, and his widow would be entitled to dower out of the same if he had recovered possession thereof, she shall be entitled to dower out of the same, although her husband shall not have recovered possession thereof; provided that such dower be sued for or obtained within the period during which such right of entry or action might be enforced." 476.

Necessity  
that issue  
of the wife  
should be  
inheritable.

No widow shall be endowed of lands or tenements, whose issue, if she have any, might not by possibility have inherited them. It is not necessary that the wife should have had issue, in order to be dowable; but yet it is necessary that any issue which she might have had, should be capable of inheriting the estate. Therefore, if a man seised in fee simple has a son by his first wife, and afterwards marries a second wife, she shall be endowed of his lands; for her issue might by possibility have been heir on the death of the son by the former wife. But, if lands are given to a person and the heirs of his body begotten on his present wife, and she dies, and he marries a second wife, that second wife shall never be endowed of the lands entailed; for her issue could not by any possibility inherit them (a). 477.

Dower  
inseparably  
incident to  
an estate  
of inheri-  
tance.

Dower of  
incorporeal  
heredita-  
ments.

Dower is an incident so inseparably annexed to an estate of inheritance, that it cannot be restrained by any proviso or condition whatever (b). 478.

A widow is dowable of several incorporeal hereditaments, such as advowsons, tithes, commons certain, as distinguished from commons without number, offices, franchises, and rents, but not of personal annuities (c). 479.

(a) 2 Bl. Com. 131; Litt. s. 53.

for Life, 81, 82.

(b) 1 Cruise T. 6, c. 2, § 4; Park  
on Dower, 81, 82; Bissett on Estates

(c) 1 Cruise T. 6, c. 2, § 11; Co.  
Litt. 32 a.

Dower is due of mines wrought during the coverture, whether by the husband or by lessees for years paying pecuniary rents or rents in kind, and whether the mines were under the husband's own land, or had been absolutely granted to him, to take the whole stratum in the land of others. But dower is not due of mines or strata unopened, whether under the husband's land or the soil of others (a). 480.

Fr. II. T. 5,  
Or. 4, s. 1.

Dower of  
mines.

A widow is not dowable of lands assigned to another woman in dower. Thus if the ancestor of a married man dies, and he endows the widow of such ancestor of one-third of the lands which descended to him, and dies, his widow will only be entitled to one-third of the remaining two-thirds; for, it is a rule of law, that *dos de dote peti non debet* (b). This rule is only applied where dower is actually assigned (c). 481.

No dower  
of land  
already  
assigned for  
dower.

No right of curtesy or dower attaches upon an estate held in joint tenancy; for the right of survivorship is preferred to all charges and incumbrances which do not amount to at least a partial alienation of the share. And of course a conveyance by a joint tenant of his share to another person, which destroys the right of survivorship, will not let in the right of the grantor's wife to dower; because he thereby ceases to be seised the very instant the right of survivorship is destroyed; he is never seised, except subject to the right of survivorship, which is paramount to the right to dower (d). 482.

No dower  
or curtesy  
of an estate  
in joint  
tenancy.

A woman is not entitled to dower out of an estate in remainder or reversion, expectant on an estate of freehold created before the marriage; and hence, if a man makes a lease for life, reserving rent to him and his heirs, and then

No dower  
of a re-  
mainder or  
reversion  
expectant  
on an estate  
of freehold.

(a) 1 Cruise T. 6, c. 2, § 1; Burton, § 1164. See *Dickin v. Hamer*, 1 Dr. & Sm. 284.

(b) 1 Cruise T. 6, c. 2, § 18; Co. Litt. 31 a.

(c) 1 Cruise T. 6, c. 2, § 20.

(d) Burton, § 353; 1 Cruise T. 6, c. 2, § 14; Co. Litt. 35 a, n. (1), 37 b.

Pr. II. T. 5.  
Ch. 4, s. 1.

Dower of a reversion expectant on a term of years, or of the immediate freehold, though subject to a chattel interest for payment of debts.

marries and dies, his wife shall not be endowed of the reversion, because the husband was not seised of the immediate freehold during the coverture; nor shall she be endowed of the rent, because he had but a particular estate, and no estate of inheritance in the rent. But a woman is dowable of a reversion expectant on a term for years, because the husband is seised of the immediate freehold, and has a present estate, though subject, as regards the possession, to a term of years (*a*). And if a person devises lands to his executors for payment of debts, and, after payment thereof, to his son in tail, and the son marries, and dies before the debts are paid, his wife shall have dower; because the estate of the executors is only a chattel interest, and the immediate freehold vested in the son on the death of the father. But the wife's dower will not commence till the debts are paid (*b*). **483.**

Dower in the case of an exchange.

A woman shall not have dower both of land given in exchange, and land taken in exchange, but she may have her election (*c*). **484.**

Mortgagee's wife, or a Jewess, or an alien not dowable. No dower of a wrongful estate.

The wife of a mortgagee is not dowable of the land in mortgage (*d*). Nor [by the old law] can a Jewess or the wife of an alien have dower (*e*). And a widow is not dowable of a wrongful estate (*f*). **485.**

When dower attaches.

The title to dower attaches at the instant of the marriage, if the husband is then seised, or the instant he becomes seised after marriage; and in cases not within the Dower Act, it would not be defeated or affected by an alienation of, or charge upon, the property, after the marriage, by the husband alone (*g*). And where a man,

Consequence of this.

Conveyance

(*a*) Co. Litt. 32 a; 1 Cruise T. 6, c. 1, § 22, and c. 2, § 8; Burton, § 354; 9 Jarm. & Byth. by Sweet, 159.

(*b*) 1 Cruise T. 6, c. 1, § 23.

(*c*) Co. Litt. 31 b.

(*d*) 1 Cruise T. 6, c. 2, § 23.

(*e*) 1 Cruise T. 6, c. 1, § 32; Co. Litt. 31 a. As to the dower of aliens, see *infra* Part IV. T. 1. Ch. 7.

(*f*) 1 Cruise T. 6, c. 2, § 16.

(*g*) See 2 Bl. Com. 132; 1 Cruise T. 6, c. 4, § 1, and c. 2, § 32.

immediately before his marriage, privately and secretly conveys his estate to a trustee for himself, in order to deprive his wife of dower, such conveyance will be deemed fraudulent and void (*a*). **486.**

Pr. II. T. 5.  
Ch. 4, s. 1.  
in fraud of  
dower.

Until assignment, however, the widow has no estate, but only a right or title of dower; for the law casts the freehold on the heir immediately on the death of the ancestor (*b*). Yet, as soon as the assignment is made, the widow is *in* of the estate of her husband, and the heir is not considered as having ever been seised of that part whereof the widow is endowed (*c*). **487.**

Widow has  
no estate  
till assign-  
ment.

Assignment  
operates by  
relation.

The assignment of dower must be absolute, and not subject to be defeated by any condition, nor lessened by any exception or reservation. But where the lands were leased for years before the marriage, the assignment of dower is made with a proviso that the tenant for years shall not be disturbed (*d*). **488.**

Assignment  
must be  
without  
condition,  
exception,  
or reserva-  
tion.

A rent issuing out of the land whereof the widow is dowable, may be assigned for dower; but an assignment of other lands, or of the rent of other lands, or of a term of years, or of a rent for years, or for the life of the person who assigns it, will not be good (*e*). **489.**

What may  
be assigned  
for dower.

By the Statute of Merton, 20 Hen. 3, c. 2, it is enacted, that a dowress may dispose by will of the growing corn; otherwise, that it shall go to her executors (*f*). **490.**

Emble-  
ments.

By the stat. 3 & 4 Will. 4, c. 27, s. 41, "No arrears of dower, nor any damages on account of such arrears, shall be recovered or obtained by any action or suit for a longer period than six years next before the commencement of such action or suit." **491.**

Arrears of  
dower.

[The power of granting leases under section 46 of stat. **Power of a tenant in**

(*a*) 1 Cruise T. 12, c. 2, § 24.

Litt. 240 b, n. (1), 241 a.

(*b*) 1 Cruise T. 6, c. 3, § 1; Watk. Conv. 3rd ed. by Prest. 41, 42.

(*d*) 1 Cruise T. 6, c. 3, § 13.

(*c*) 1 Cruise T. 6, c. 3, § 21; Co.

(*e*) 1 Cruise T. 6, c. 3, § 11, 12.

VOL. I.

(*f*) 1 Cruise T. 6, c. 2, § 27.

Pr. II. T. 5.  
CH. 4, s. 1.

dower to  
grant  
leases.

40 & 41 Vict. c. 18 (Appendix), is expressly given to a tenant in dower by the same section. But no mention of a tenant in dower appears to be made in stat. 45 & 46 Vict. c. 38 (Appendix).] **491a.**

## SECTION II.

*Of the Modes of preventing, at Law and in Equity, the Title to Dower from arising, independently of the Dower Act: and herein, of Uses to prevent Dower, and of Legal Jointures.*

Pr. II. T. 5.  
CH. 4, s. 2.

Ways of  
preventing  
dower,  
whether  
at law or  
in equity.

I. Uses to  
prevent  
dower.

There are certain modes by which dower may be prevented from ever arising, even independently of the Dower Act. **492.**

I. One way is, by conveying or devising the property so as virtually to give the purchaser or devisee the benefit of an estate of inheritance in possession, and yet to limit the property to him in such a manner that he does not actually take such an estate. This object has been sought to be effected in different modes, with different degrees of success. **493.** Thus,

Old limita-  
tions to  
prevent  
dower.

Formerly it was a practice to limit the estate to a purchaser or devisee and a trustee and their heirs, but, as to the estate of the trustee and his heirs, in trust for the purchaser or devisee in fee or in tail; or to the purchaser and a trustee for life in joint tenancy, with remainder to the purchaser in fee or in tail. But this exposed him to the chance of the trustee dying in his lifetime, in which case the right of dower would attach upon the estate. In other instances, the estate was limited to the purchaser or devisee and a trustee, and the heirs of the trustee, but in trust for the purchaser or devisee; or immediately and exclusively to the trustee and his heirs in trust for the purchaser or devisee in fee or in tail. But each of these modes was objectionable, as they kept the legal inher-

ance from the purchaser or devisee, and exposed him to all the inconvenience of its escheating to the Crown for want of heirs of the trustee, or of its becoming vested in infants, married women, or persons residing at a distance, not easily discoverable, or not willing to join in the conveyances required to be made of it (a). 494.

PR. II. T. 5.  
CH. 4, s. 2.

As there can be no dower of a remainder or reversion expectant on an estate of freehold, another mode was to convey to the use of a trustee during the joint lives of the purchaser and his wife, or for the life of the purchaser, remainder to the purchaser in fee. But this rendered the concurrence of the trustee necessary, to pass the legal estate vested in him, in the case of a sale or mortgage by the purchaser during the coverture (b). 495.

To prevent these inconveniences, Butler suggested, that the estates may be limited to such uses as the purchaser or devisee shall appoint, and, for want of appointment, to the use of a trustee, his heirs and assigns, during the life of the purchaser or devisee, in trust for him, and subject thereto to the use of the purchaser or devisee in fee or in tail (c). 496.

Butler's  
mode.

Another mode, suggested by Fearn, is, to convey or devise to such uses as the purchaser or devisee shall appoint; and in default of appointment, to the use of the purchaser or devisee and his assigns for life, without impeachment of waste, and immediately after the determination of that estate by any means (or by any means in his lifetime), to the use of a trustee and his heirs (or more usually and properly, his executors and administrators), during the natural life of the purchaser or devisee, upon trust for him and his assigns; and, after the determination of that estate, to the use of the purchaser or devisee

Fearn's  
mode.

(a) Co. Litt. 379 b, n. (1); (b) Watk. Conv. 3rd ed. by Watk. Conv. 3rd ed. by Prest. 45, Prest. 47.  
46, 48. (c) Co. Litt. 379 b, n. (1).

Pr. II. T. 5, himself, in fee or in tail, or to the heirs or the heirs of  
CH. 4, c. 2. the body of the purchaser or devisee (a). 497.

These are the best limitations to prevent dower. The first, namely, the power of appointing, gives the husband power of passing the whole fee without the concurrence of any other person ; and the appointee being considered to be in under the instrument creating the power, takes paramount to the claims of the wife. The second, the limitation to the husband for his life, gives him the present legal right to the possession, the rents, and the freehold. The third, the limitation to the trustee for the life of the husband, by creating an intervening estate of freehold, places and keeps the inheritance in remainder, so as to prevent dower from ever attaching. The fourth, the limitation of the inheritance to the husband, vests a legal estate in him, so that if he dies without making any appointment, the inheritance will vest in his heirs or those to whom he may give his property (b). 498.

II. Legal  
jointure.  
Origin of  
legal  
jointures.

II. Another way of preventing the title to dower from ever arising is by a jointure. As it was held, before the Statute of Uses, that a woman was not dowable of a use, estates were frequently conveyed to uses in order to bar dower (c). When the Statute of Uses was passed, for the purpose of converting uses into legal estates, all women then married would have become dowable of such lands as had been held to the use of their husbands, and would also have been entitled to any lands that were settled on them in jointure. A clause was therefore inserted in the Statute of Uses, by which it was enacted that a certain provision made for the wife should operate as a bar of dower (d). This statute has given rise to the

(a) See Fearn, 347, and notes ;  
Co. Litt. 379 b, n. (1), 239 b, n. (3) ;  
9 Jarm. & Byth. by Sweet, 74, n.,  
156, n. ; Watk. Conv. 3rd ed. by  
Prest. 46 ; Smith's Executory In-

terests annexed to Fearn, § 258.

(b) Watk. Conv. 3rd. ed. by Prest.  
48—50.

(c) 1 Cruise T. 7, c. 1, § 2.

(d) Id. § 3, 4.



modern jointure, which Lord Coke defines to be, "A competent livelihood of freehold for his wife, of lands or tenements, etc., to take effect presently in possession or profit after the decease of her husband, for the life of the wife at least, if she herself be not the cause of its determination or forfeiture" (a). 499.

Pr. II. T. 5.  
Ch. 4, s. 2.  
Definition of  
a jointure.

As this statute contradicts the common law, it has always been construed strictly; and no estate is a good jointure and a bar to dower at law under this Act, unless it is attended with the following circumstances (b):—1. It must commence and take effect, in possession or profit, immediately on the death of the husband; for otherwise it is not so beneficial as dower (c). 2. It must be for the wife's life, or for some greater estate, and not for the life or lives of another person or any number of other persons, or for any number of years, however many. But although the statute recites five kinds of estates which may be limited by way of jointure, yet these are only mentioned as examples, and do not exclude any other estate consistent with the intention of the Act (d). 3. The estate must be limited to the wife herself, and not to any other person in trust for her (e). 4. It must be made in satisfaction of the wife's whole dower (f). 5. It must be expressed or averred to be in satisfaction of her whole dower, or (which amounts to the same thing) of her dower indefinitely (g). 6. It must be made before marriage (h). 500.

Requisites  
to a legal  
jointure.

A jointure which has these requisites prevents the title to dower from ever arising, whether at law or in equity, even in the case of an infant (i). 501.

Effect  
thereof.

(a) Co. Litt. 36 b.

(b) 1 Cruise T. 7, c. 1, § 6.

(c) Co. Litt. 36 b; 2 Bl. Com. 138; 1 Cruise T. 7, c. 1, § 7.

(d) Co. Litt. 36 b; 2 Bl. Com. 138; 1 Cruise T. 7, c. 1, § 9, 35.

(e) Co. Litt. 36 b; 2 Bl. Com. 138; 1 Cruise T. 7, c. 1, § 12.

(f) Co. Litt. 36 b; 2 Bl. Com. 138; 1 Cruise T. 7, c. 1, § 17.

(g) Co. Litt. 36 b; see 2 Bl. Com. 138; 1 Cruise T. 7, c. 1, § 17, 18.

(h) 2 Bl. Com. 138; 1 Cruise T. 7, c. 1, § 21.

(i) 1 Cruise T. 7, c. 1, § 22, 31.

Pr. II. T. 5,  
Ch. 4, s. 2.

Jointures  
under  
powers.

A power to jointure a wife in proportion to the fortune she brings, does not arise if the fortune is settled to her separate use. But it is not necessary that the fortune should be paid to the husband. It may be settled on him and the wife and family (a). 502.

In execution of a power to jointure, it is necessary that the lands which are subject to the power should be conveyed to the wife herself, and not to trustees for her (b). 503.

A general power to jointure to a particular amount does not authorise an appointment clear of natural outgoings, as parochial payments and repairs, etc. (c). And even where the jointure is to be of the *clear* yearly value of a certain sum, it only means clear of charges which are usually borne by the tenant, and not of those which are usually borne by the landlord (d). And where land of a given value is to be settled, the jointure will only be free from such taxes as were in being at the time of executing the power, and from the amount of then existing taxes which was then payable, and not from any future increase of such taxes: for otherwise, whenever any tax was increased, the jointress would come into a Court of Equity to make good against the remainderman the deficiency in the jointure thereby occasioned (e). 504.

Rent charge  
for jointure.

It has long become a general practice to limit a rent charge to the intended wife for her life as a jointure, to commence on the death of the husband, with powers of distress and entry, and a term for years for further securing the payment of it. [And now the powers, given by s. 44 of stat. 44 & 45 Vict. c. 41 (Appendix), of distress and entry, and of demising the land which is subject to the jointure rent charge, upon trusts for raising such rent charge, afford a security for the due payment of the rent charge

(a) 2 Sugd. Pow. 301.

(b) 2 Sugd. Pow. 291.

(c) 2 Sugd. Pow. 294.

(d) 2 Sugd. Pow. 294—5.

(e) 2 Sugd. Pow. 296.

in cases where such remedies are not expressly given.] Pr. II. T. 5.  
Ch. 4, s. 2.  
This is more convenient both to the widow and to the heir; as a more certain income is thereby provided for the former, and the latter continues in the possession and management of the whole estate (*a*). **505.**

A jointress is considered in equity as a purchaser for valuable consideration, even though she brought her husband no fortune; marriage alone being deemed a valuable consideration; and therefore an agreement to settle a jointure will be decreed to be specifically performed (*b*). For the same reason a jointress will be relieved in equity, as also at law, against a prior voluntary conveyance (*c*). And a Court of Equity will also set aside a satisfied term for years in favour of a jointress, though it will not do so in favour of a dowress (*d*). **506.**

Jointress considered as a purchaser, and entitled to relief as such.

Where lands limited or agreed to be limited in jointure are either covenanted or even merely expressed to be of a certain annual value, and afterwards prove deficient, the jointress is entitled to have the deficiency made good out of other lands of the husband, and to come in as a specialty creditor upon the husband's estate for the arrears of the deficiency, with interest (*e*). And though a married woman neglect during coverture to get the deficiency made good, yet a court of equity will assist her (*f*). **507.**

Deficiency of jointure.

A jointress is not entitled to the crops sown at the time of her husband's death; because jointure is not a continuance of the estate of her husband, like dower (*g*). **508.**

Crops.

There is a proviso in the statute 27 Hen. 8, c. 10, s. 7, "That, if any woman be lawfully expulsed or evicted from her said jointure, or from any part thereof, without any fraud or covin, by lawful entry, or by discontinuance of her husband, then every such woman shall be endowed of

Eviction of jointress.

(*a*) 1 Cruise T. 7, c. 1, § 42. And see *supra*, par. 86 a, and 86 b.

(*b*) 1 Cruise T. 7, c. 2, § 1.

(*c*) 1 Cruise T. 7, c. 2, § 7.

(*d*) 1 Cruise T. 7, c. 2, § 8.

(*e*) 1 Cruise T. 7, c. 2, § 16—19.

(*f*) 1 Cruise T. 7, c. 2, § 9.

(*g*) *Id.* c. 1, § 40.

Pt. II. T. 5.  
CH. 4, s. 2.

as much of the residue of her husband's tenements or hereditaments whereof she was before dowable, as the same lands and tenements so evicted and expelled shall amount or extend unto" (a). 509.

Barring  
jointure.

Where a jointure is settled before marriage pursuant to the statute, it so far resembles dower before the late Act. that it cannot be defeated by the alienation of the husband alone, or be charged with any incumbrances created by him after the marriage (b). But if a wife joined with her husband in levying a fine or suffering a common recovery of the lands settled on her as jointure or out of which the jointure was to issue, she was thereby barred of such jointure, upon the same principle as that by which a fine or recovery barred her of dower (c). If the jointure whereof the wife levied a fine or suffered a recovery was made before marriage, the wife was then barred not only of her jointure, but also of her claim to dower. But if the jointure was made after marriage, a fine or recovery by the husband and wife of such jointure did not bar the wife of her right to dower; because a jointure so made was originally waivable, and the time of her election to accept or waive it did not come till after her husband's death (d). 510.

A general devise of other lands or a bequest of personalty by a husband to his wife, will not operate as a bar to jointure settled on the wife, either before or after marriage (e). But where a freehold estate is devised to a woman expressly for jointure, and in bar and satisfaction of a jointure settled on her either before or after marriage, she must make her election (f). 511.

Misconduct  
of jointress  
or her  
husband.

Jointure is not lost by the treason or felony of the husband (g), nor by the elopement and the adultery of the

(a) 2 Bl. Com. 138; 1 Cruise T. 7, c. 1, § 43.

(b) 1 Cruise T. 7, c. 3, § 1.

(c) Id. § 1; Co. Litt. 36 b.

(d) Id. § 2; Co. Litt. 36 b.

(e) 1 Cruise T. 7, c. 3, § 7.

(f) Id. § 13.

(g) Co. Litt. 37 a; 2 Bl. Com. 139; 1 Cruise T. 7, c. 3, § 3.

wife. Nor do these acts even preclude her from obtaining specific performance of marriage articles (*a*). **512.**

Pr. II. T. 5.  
Ch. 4, s. 2.

III. By an  
estate  
created  
before  
marriage.

III. In some cases dower is prevented, and in other cases it is not prevented, by an estate created before the marriage. 1. At common law, in the case of a lease before marriage for a term of years, rendering rent, the wife would be entitled to her dower of a third part of the reversion by metes and bounds, and to a third part of the rent; and execution would not cease during the term. 2. If the husband made a gift in tail, rendering rent, as the rent was payable out of or in respect of an estate of inheritance, the wife would be endowed with a third part of the rent. 3. If a man before marriage made a lease for life, rendering rent, the wife was not entitled to her dower of the rent, because it was not payable in this case out of or in respect of an estate of inheritance. 4. If the husband made a lease for years, reserving no rent, then judgment would be given for the wife, with a cesset executio during the term. This, if the term were of long duration, deprived her, virtually, of her dower. 5. If a person purchased an estate of inheritance which was in mortgage for a term of years, the wife of the vendor would not be entitled to her dower in equity, if the term was created before the marriage of the vendor, and actually assigned before his death to a trustee for the purchaser to attend the inheritance. 6. If a person died seised in fee, subject to a term of years, if the term were a term in gross, for securing the payment of a sum of money, the widow, by discharging the money secured by it, or paying one-third of the interest, would be entitled to dower. 7. If the term were an outstanding satisfied term, she would also be entitled to her dower against the heir or a devisee (*b*). **513.**

(*a*) 1 Cruise T. 7, c. 3, § 4.

1 Cruise T. 6, c. 2, § 9; Watk. Conv.

(*b*) Co. Litt. 208 a, n. (1), 32 a;

3rd ed. by Prest. 52, 53.

## SECTION III.

*Of the Modes in which Dower may be barred or lost, at Law and in Equity, after the Title to it has arisen, independently of the Dower Act.*

Pr. II. T. 5,  
Ch. 4, s. 3.

There are several ways in which dower may be barred or lost, after the title to it has arisen, in the lifetime of the husband, independently of the Dower Act. 514. Thus :

I. Exercise  
of a power  
of appoint-  
ment.

I. If the husband has a power of appointing the inheritance, and he exercises that power, the appointee takes the estate freed from the dower of the appointor's wife. For this reason (amongst others), instead of conveying or devising directly to the use of the grantee or devisee, in fee or in tail, it is a common practice to limit the property to such uses as he shall appoint; and, in default of appointment, to the use of the grantee or devisee, in fee or in tail, so as to give him the power of barring his wife of dower, if he chooses. In most cases, however, the ordinary uses altogether to prevent dower from ever arising are inserted, and the power of appointment is prefixed to them (a). 515.

II. Fine or  
recovery.  
Statutory  
modes of  
barring  
dower.

II. A woman could not be barred of her dower by an ordinary assurance, even if she joined in it. But a woman might be barred of dower, by joining her husband in a fine or recovery; and she might be barred by the alienation of the husband alone, by a fine with proclamations, and non-claim (b). But these assurances have been abolished, and much more simple modes of barring dower have been substituted by the Dower Act (c), in the case of women married after the 1st of January, 1834. And women, whether married on or before that day or after-

(a) 9 Jarm. & Byth. by Sweet,  
164; 2 Sugd. Pow. 31, 32; Watk.  
Conv. 3rd ed. by Prest. 47.

6, c. 4, § 14; Watk. Conv. 3rd ed.  
by Prest. 43, 44.

(c) See *infra*, page 238.

(b) 2 Bl. Com. 126; 1 Cruise T.

wards, may extinguish their dower, under the 77th section of the stat. 3 & 4 Will. 4, c. 74. **516.**

Pr. II. T. 5,  
Ch. 4, s. 3.

III. A bargain and sale of lands or tenements in London, executed by husband and wife, and acknowledged by them before the Lord Mayor, or the Recorder and one Alderman (the wife being examined separately and apart from her husband), and proclaimed and enrolled in the Hustings of Pleas of Land or Common Pleas of the City, is effectual for barring a wife of dower. And there is not any necessity for a separate bargain and sale; for if a release in fee have the words bargain and sell, which is generally the case, it may be used by the parties as a bargain and sale (a). **517.**

III. Bargain  
and sale of  
lands in  
London,

This custom is not peculiar to London; for, by the custom in many other cities and boroughs, a bargain and sale by the husband and wife, where the wife is examined by the Mayor or other officer, binds the wife and those claiming under her, and is equivalent to a fine. And by the stat. 34 Hen. 8, c. 22, all such customary conveyances shall be of force, notwithstanding the stat. 32 Hen. 8, c. 28 (a). **518.**

and some  
other places.

IV. A woman does not lose her dower by a divorce à mensâ et thoro, nor will she lose it by a judicial separation, which by the stat. 20 & 21 Vict. c. 85, s. 7, is substituted for a divorce à mensâ et thoro. But she loses her title to dower by a divorce à vinculo matrimonii (b). And in consequence of the stat. Westm. 2, 13 Edw. 1, c. 34, if a woman willingly leaves her husband, and remains with another man, so as to commit adultery, though she left her husband in consequence of his behaviour and gross misconduct, she thereby loses her dower; unless the husband afterwards takes her back,

IV. Loss of  
dower by  
divorce,  
or by  
adultery.

(a) 1 Jarm. & Byth. by Sweet,  
262 (a); 1 Cruise T. 6, c. 4, § 15.

(b) Co. Litt. 32 a. 33 b; 2 Bl.  
Com. 130; 1 Cruise T. 6, c. 1, § 16, 18.

Pr. II. T. 5, without coercion of the church (*a*). By 5 & 6 Edw. 6, Ch. 4, s. 3. c. 11, the widows of those who are attainted of high treason or petit treason, and women who are attainted of treason or felony, shall have no dower (*b*). Petit treason, however, has been abolished by the stat. 9 Geo. 4, c. 31, s. 2; which provides that homicides which formerly amounted to that offence, shall be deemed in future to be murder only (*c*). [And attainder for treason or felony has also been abolished by stat. 32 & 33 Vict. c. 23.] 519.

or by  
treason or  
felony.

#### SECTION IV.

##### *Of the Modes of preventing or barring Dower, in Equity, independently of the Dower Act.*

Pr. II. T. 5,  
Ch. 4, s. 4.

Modes of  
preventing  
or barring  
dower in  
equity.

Gift of a  
trust estate.  
Ante-  
nuptial  
agreement  
to settle  
lands.  
Bond.

Independently of the provisions of the Dower Act, there are other modes of making a provision for a woman in equity, which will either prevent the title to dower from ever arising, or will bar it after it has arisen. 520. Thus:

A trust estate, or an ante-nuptial agreement to settle lands as a jointure, is a good equitable jointure (*d*). And where, by a settlement made on the marriage of an adult female, "for providing a competent jointure and provision for maintenance" for her, it is agreed that the husband shall give a bond to the trustees, such a settlement is an equitable bar of dower; and although the money secured by the bond be not paid, yet the wife has no title to dower of, nor any lien on, after-acquired lands of the husband (*e*). 521.

Election.

A widow may be barred of her dower by election. 522.

(*a*) See Co. Litt. 32 a, b; 1 Cruise T. 6, c. 1, § 17, and c. 4, § 5—11; *Hontock v. Smith*, 34 Beav. 57.

(*b*) Co. Litt. 37 a, 392 b; 2 Bl. Com. 130—1; 1 Cruise T. 6, c. 4, § 2, 4.

(*c*) 4 Steph. Com. 148, 214, n.

(*d*) 1 Cruise T. 7, c. 1, § 13; Co. Litt. 36 b, n. (5).

(*e*) *Dyke v. Rendall*, 2 D. G. M. & G. 209.



Before the Dower Act, a provision made for a woman after marriage in lieu of dower, was only a bar to dower if she chose to accept it after her husband's death (*a*). 523.

Pr. II. T. 5.  
Ch. 4, s. 4.  
Post-nuptial  
provision  
elected by  
the widow.  
Rules as to  
election.

In order to deprive a widow of her dower by election, it must be shown that the testator intended to dispose of his property in a manner inconsistent with his wife's right to dower (*b*); or that there is, on the face of the will, strong ground for holding that she was not intended to take both her dower and the benefits given her by the will (*c*). Hence, a bequest to the widow, merely affecting the personal assets of the testator, without any declaration that it shall be in bar of dower, does not raise a case of election, because there is no inconsistency between the dower and the bequest (*d*). Nor does the gift of an annuity or rent charge to her out of the particular estate in which she is dowerable, unless the estate is insufficient both to pay the annuity and to meet the dower. Nor does such a gift out of other estates, unless the provisions or limitations in the will are quite inconsistent with a right to dower (*e*). But where a testator, after contracting to sell part of his real estate, devises all his real and personal estate to trustees, and directs them to complete the contract, and to sell and convert into money all his real and personal estate, and out of the interest of the moneys to arise from the sales to pay an annuity to his wife for her life, and he empowers his trustees to lease such parts of his real estate as should not be sold, the widow is bound to elect between the benefits given her by the will and her dower, which is inconsistent with the contract and the power of leasing (*f*).

(*a*) 2 Bl. Com. 138; 1 Cruise T. 7, c. 1, § 22, and c. 3, § 2; Co. Litt. 36 b.

(*b*) *Parker v. Sowerby*, 4 D. M. & G. 326; *Wetherell v. Wetherell*, 4 Gif. 51. And see cases cited 1 Jarm. Wills, 2nd ed. 382—391.

(*c*) *Thompson v. Burra*, L. R. 16 Eq. 592.

(*d*) 2 Rep. Leg. by White, 1617.

(*e*) 2 Rep. Leg. by White, 1627; Co. Litt. 36 b, n. (6).

(*f*) *O'Hara v. Chainé*, 1 Jones & Lat. 662.

FR. II. T. 5, CH. 4, s. 4. — And so where an annuity is given to the wife, and powers to sell, lease, and cut timber are vested in trustees, the wife is bound to elect between the annuity and her dower (a). But mere powers or trusts for sale are not inconsistent with the widow's right to dower, as a sale is constantly made subject to that right (b). 524.

Devises expressly made in lieu of dower, have operated so as to give the widow an election (c); but where they have not been declared to be in lieu, or satisfaction, or bar of dower, they cannot in general be averred to be given for that purpose (d), especially if less beneficial than dower (e). 525.

If the husband exchanges his lands for others, his widow shall have her election to be endowed either of the lands given or of those taken in exchange; because her husband was seised of both during the coverture (f). 526.

Before a widow can be bound by election, she must be informed of the nature and extent of her rights as widow. And therefore where she accepts the benefits given her by her husband's will, in ignorance of her rights as widow, she will not be precluded from claiming her dower, notwithstanding a lapse of several years (g). 527.

## SECTION V.

### *Of the preventing, barring, or affecting Dower, under the Dower Act.*

FR. II. T. 5 CH. 4, s. 5. — I. By the stat. 3 & 4 Will. 4, c. 105, dower may be wholly prevented from arising, or be barred, at law and

(a) *Parker v. Sowerby*, 4 D. M. & G. 321; *Linley v. Taylor*, 1 Gif. 67.

(b) *Bending v. Bending*, 3 K. & J. 257.

(c) 1 Cruise T. 6, c. 4, § 22.

(d) 1 Cruise T. 6, c. 4, § 17.

(e) *Id.* § 19.

(f) *Id.* c. 2, § 12.

(g) *Sopwith v. Maughan*, 30 Bear 235.

in equity, in various ways: namely, 1. By an absolute disposition of the property by any deed or will of the husband. 2. By a declaration in the deed of conveyance to him, or in any deed or will executed by him. 3. By a devise to or for the widow, of any real estate whereof she would otherwise have been dowable, or any interest therein. **528.** Thus :

1. By s. 4, "no widow shall be entitled to dower out of any land (a) which shall have been absolutely disposed of by her husband in his lifetime, or by his will." **529.**

Pr. II. T. 5,  
Ch. 4, s. 5.  
1. By alienation.

2. By s. 6, "a widow shall not be entitled to dower out of any land of her husband, when, in the deed by which such land was conveyed to him, or by any deed executed by him, it shall be declared that his widow shall not be entitled to dower out of such land." And by s. 7, "a widow shall not be entitled to dower out of any land of which her husband shall die wholly or partly intestate, when by the will of her husband, duly executed for the devise of freehold estates, he shall declare his intention that she shall not be entitled to dower out of such land, or out of any of his land." **530.**

2. By declaration.

3. By s. 9, "where a husband shall devise any land out of which his widow would be entitled to dower if the same were not so devised, or any estate or interest therein, to or for the benefit of his widow, such widow shall not be entitled to dower out of or in any land of her said husband, unless a contrary intention shall be declared by his will" (b). But by s. 10, "no gift or bequest made by any husband to or for the benefit of his widow of or out of his personal estate, or of or out of any of his land not liable to dower, shall defeat, or prejudice her right to dower, unless a contrary intention shall be declared by his will." **531.**

3. By devise.

(a) By s. 1 "land" extends to other hereditaments liable to dower.

(b) See *Lacey v. Hill*, L. R. 19 Eq. 346.

Pr. II. T. 5,  
Ch. 4, s. 5.

I. Modes of  
affecting  
dower in  
other ways.

II. By the same statute, dower may also be affected in several other ways. Thus by s. 5, "all partial estates and interests, and all charges created by any disposition or will of a husband, and all debts, incumbrances, contracts, and engagements to which his land shall be subject or liable, shall be valid and effectual as against the right of his widow to dower." And by s. 8, "the right of a widow to dower shall be subject to any conditions, restrictions, or directions which shall be declared by the will of her husband, duly executed as aforesaid." 532.

Notwithstanding the 5th section, and the enactment of the stat. 3 & 4 Will. 4, c. 104, which makes real estate assets for payment even of simple contract debts, dower or freebench has priority over a deceased person's mere creditors, who had no charge in his lifetime on his land (a). But a widow takes subject to a mortgage created by her husband (b). 533.

III. Agree-  
ment not  
to bar  
dower.

III. By s. 11 of the Dower Act, "nothing in this Act contained shall prevent any Court of Equity from enforcing any covenant or agreement entered into by or on the part of any husband not to bar the right of his widow to dower out of his lands, or any of them." 534.

IV. Saving  
clause.

IV. By s. 14, "this Act shall not extend to the dower of any widow who shall have been or shall be married on or before the 1st day of January, 1834, and shall not give to any will, deed, contract, engagement, or charge executed, entered into, or created before the said 1st day of January, 1834, the effect of defeating or prejudicing any right to dower." 535.

In consequence of this section, the dower of a woman married since the 1st of January, 1834, is not excluded by the ordinary limitations to bar dower in a conveyance

(a) *Spyer v. Hyatt*, 20 Beav. 621; 361; and see *Dawson v. Bank of*  
and see *Jones v. Jones*, 4 K. & J. 363. *Whitehaven*, L. R. 6 Ch. D. (Ap.)

(b) *Jones v. Jones*, 4 K. & J. 218.

before the Act, even though the words be inserted—"to the intent that the present or any future wife of the party may not be entitled to dower" (a). [And in consequence of section 6 of the Act, it became a common practice to insert in a conveyance, a declaration that the purchaser was not married on or before the 1st day of January, 1834, to a woman living at the date of the conveyance, and that no widow of the purchaser should be entitled to dower out of the purchased property; but such a declaration which operated to defeat the widow's dower in favour of the purchaser's heir-at-law, even if a distant relation, is now less frequently resorted to.] 536.

Pr. II. T. 5.  
Ch. 4, s. 5.

This Act applies to gavelkind lands (b). 537.

Where a widow only releases her dower in order to give a good title to a mortgagee for the purpose of his security, the effect of the release is at an end when the reconveyance takes place (c). 537a.

Release of  
dower to a  
mortgagee.

## SECTION VI.

### *Of Freebench.*

Copyholders not having the freehold of the lands, their widows are not entitled to dower. But in most manors there is a custom that the widows of copyholders shall have a certain portion of their husbands' lands for their support, which is generally called the widow's freebench (d). In most manors freebench consists of one-half of the husband's copyhold; in others, of a third or a fifth; and in some few, of the whole. It is generally an estate for life,

Pr. II. T. 5.  
Ch. 4, s. 6

No dower  
of copy-  
holds.  
Freebench.

Of what  
freebench  
consists.

(a) *Fry v. Noble*, 20 Beav. 598; 7 D. M. & G. 687; *Clarke v. Franklin*, 4 K. & J. 266.

(b) *Farley v. Bonham*, 2 Johns. & Hem. 177.

(c) *Meek v. Chamberlain*, 8 Q. B. D. 31.

(d) 1 Cruise T. 10, c. 3, § 22; 2 Bl. Com. 132; Burton, § 1311.

Pr. II, T. 5,  
Ch. 4, s. 6.

Freebench  
of life  
estates.

No free-  
bench of an  
equitable  
estate.

Position of  
the widow.

Jointure  
a bar.

Alienation  
a bar.

Effect of a  
lease.

and in many manors it is forfeited by incontinency or a second marriage (a). 538.

In some manors freebench is incident even to copyholds granted only for life (b). 539.

By the old law, equitable copyhold estates are not subject to freebench. And the Dower Act, which gives dower out of equitable freehold estates, does not apply to freebench. So that when a surrenderee dies before admittance, though after entry on the lands, his widow is not entitled to freebench (c). 540.

This estate, being considered as a continuation of the estate of the husband, is perfect without admittance (d); but when the widow is admitted to her freebench, she holds as tenant to the lord, and the heir is not admitted during her life (e). 541.

A jointure, whether legal or equitable, is a good bar to freebench (f). 542.

In general freebench does not [attach until the actual decease of the husband and does not], like dower, attach on all the copyhold estates which the husband had during the coverture, but only on those whereof he died seised; so that a copyholder may defeat his wife's right to freebench by any species of alienation (g), though it be only by way of mortgage (h), and even by a surrender to the use of his will [or by a general devise of the lands without such surrender] (i). 543.

If a copyholder makes a lease for years, the feme shall not be endowed of the third part of the rent and reversion;

(a) 1 Cruise T. 10, c. 3, § 22;  
2 Bl. Com. 132; Burton, § 1311.

(b) 1 Cruise T. 10, c. 3, § 24.

(c) Id. § 26, and T. 12, c. 2, § 22,  
23; *Smith v. Adams*, 5 D. M. & G.  
712.

(d) Burton, § 1311.

(e) 1 Cruise T. 10, c. 3, § 31.

(f) Id. § 32. But see *Willis v. Willis*, 34 Beav. 340.

(g) Id. § 34; Burton, § 1311;  
*Watk. Conv.* 3rd ed. by Prest. 44;  
2 *Watk. Cop.* 89.

(h) 1 Cruise T. 10, c. 3, § 36, 37.

(i) Id. § 38; *Lacey v. Hill*, L. R.  
19 Eq. 346.

because customs ought to be strictly pursued, and the custom is only to be endowed of the land. Yet it seems after the lease is ended, she shall be endowed; because the husband did die seised; the possession of his lessee being his own possession (*a*). **544.**

Pr. II. T. 5,  
Ch. 4, s. 6.

Even an agreement to convey, will, in equity, bar the widow of a copyholder of her right to freebench (*b*). **545.**

Effect of an  
agreement  
to convey.

If a copyholder does any act which by the custom of a manor amounts to a forfeiture of his estate, his wife will thereby lose her freebench (*c*). **546.**

Forfeiture,  
a bar.

Where the lord of the manor conveys the freehold of the land to the copyholder in fee, his wife shall thereby lose her freebench, because the copyhold is destroyed (*d*). **547.**

Conveyance  
by the lord  
a bar.

A general devise of other lands will not bar a widow of freebench, for the same reason that it will not bar dower. But where it is expressed to be in satisfaction of dower the widow is then put to her election (*e*). **548.**

Freebench  
barred by  
a devise.

Where freebench determines by the act of God, there shall be emblements, as in the case of a freehold estate for life. But where it determines by the act of the widow, as by incontinency or a second marriage, it is otherwise (*f*). **549.**

Emble-  
ments.

(*a*) 1 Cruise T. 10, c. 3, § 39, 40.

(*b*) Id. § 41.

(*c*) Id. § 45.

(*d*) Id. § 46.

(*e*) 1 Cruise T. 10, c. 3, § 47.

(*f*) 1 Cruise T. 10, c. 3, § 28.

## TITLE VI.

### OF ESTATES OR INTERESTS LESS THAN FREEHOLD.

PART II.  
TITLE 6.

THESE are of several kinds :—

Their  
different  
kinds.

- I. Estates for years.
- II. Estates at will.
- III. Interests by sufferance.
- IV. Chattel interests created for special purposes. 550.

#### I. *Of an Estate for Years.*

Definition  
of this  
estate.

An estate for years is such a right to the possession, as, either by entry or by virtue of the Statute of Uses, is clothed with the possession (as distinguished from the seisin or ownership) of lands or tenements, for any number of years specified in the instrument creating the estate, or to be fixed by a person therein mentioned, or from year to year, or for a single year, or any less period denoted by one of the ordinary divisions of time (*a*). 551.

Explanatory observations as to the possession.

A lessee for years has no seisin or ownership of the lands or tenements (*b*). Nor does he acquire any estate, in the case of a common law lease, until entry; for the mere delivery of a common law lease only gives him a right of entry, which is called his interest in the term, or an *interesse termini* : yet no intermediate act of the lessor or of a stranger can disturb it (*c*). But an estate for years may be created by bargain and sale and in other modes, without

(*a*) See 2 Bl. Com. 140, 143; 1 Cruise T. 8, c. 1, § 3.

and see *supra*, Tit. 4, c. 1.

(*b*) 1 Cruise T. 8, c. 1, § 10; Watk. Conv. 3rd ed. by Prest. 19;

(*c*) Id. § 10, 12, 13, 19; 2 Bl. Com. 124; Co. Litt. 270 a; Watk. Conv. 3rd ed. by Prest. 20.



entry, under the Statute of Uses (a). After entry, in the case of a common law lease, or immediately on the delivery of a deed creating an estate for years under the Statute of Uses, which converts a use into an actual estate, the lessee or termor has the possession, while the seisin or ownership still remains in the freeholder (b). 552.

PART II.  
TITLE 6.

A lease for years may be made to begin either at a precise day or time, or on some particular event, whether certain or uncertain ; but it must be made so as to expire at the furthest at a time certain, so that its *utmost* duration may be capable of being computed, although it may be made previously determinable, by means either of a condition or of a limitation, on some contingent event (c). Hence, if a lease is made for twenty-one years, if J. S. shall live so long, or if the coverture between J. S. and D. S. shall so long continue, or if J. S. shall continue to be parson of Dale so long : these are good leases for years ; for they cannot endure beyond the number of years specified, although they may determine before the effluxion of those years, in the events fixed for the collateral determination of the term. But if a lease is made for so many years as A. and B. or either of them shall live, not naming any certain number of years : or if the parson of Dale makes a lease of his glebe for so long as he shall be parson ; this is not a good lease for years. But if the instrument may operate by reason of livery of seisin, or may take effect as a grant of a remainder or reversion, it may pass an estate of freehold, and by so many years will be understood so much time (d). And if a tenant has an agreement with his landlord that the landlord will not turn him out as long

As to the  
beginning  
and end.

(a) 1 Cruise T. 8, c. 1, § 14 ; Ch. 1, 2 ; 2 Pres. Shep. T. 272, 275 ; Watk. Conv. 3rd ed. by Prest. 20, 21. Co. Litt. 45 b ; 2 Bl. Com. 143 ; 1

(b) 1 Cruise T. 8, c. 1, § 10, 12 ; Cruise T. 8, c. 1, § 6 ; Watk. Conv. 3rd ed. by Prest. 16, 17.

(c) See 4 Cruise T. 32, c. 5, § 12 (d) 2 Pres. Shep. T. 275 ; Co. Litt. 4 b.

—18, 21 ; see supra, Part II. Tit. 1.

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as he pays his rent, the tenant has a right, in equity, as against his landlord, to retain possession as long as he pays his rent (a). If a lease is made to one for years, or for years determinable upon lives, and afterwards a lease is made to another of the same thing from the end of the former lease, the commencement is sufficiently certain. And if there be not any such lease, or the lease to which reference is made is void, the second lease will take effect immediately (b). 553.

The beginning need not be specified; for if no day of commencement is named, it begins from the making or delivery of the lease (c). And the duration of a term may be left to be fixed by a third person. Thus, a lease for so many years as J. S. shall name, is valid; for though uncertain at first, yet when J. S. has named the years it is then reduced to a certainty (d). 554.

Again, a lease may be made for two or more definite periods, as for seven, fourteen, or twenty-one years, at either of which periods the lessee may determine the lease (e). So, a lease may be made "for one year, and so on from year to year," or "not only for one year, but from year to year," and this creates a tenancy for at least two years (f). So, a lease may be made for one year, and so for two or three years, or any further term of years, as the lessor and lessee shall think fit and agree after the expiration of one year, and this will be a good lease for two years; and after every subsequent year is begun, the lease is not determinable till that year be ended (g). So a lease may be made from day to day, or from week to

(a) *In re King's Leasehold Estates, Ex parte East of London Ry. Co.*, L. R. 16 Eq. 521.

(b) 2 Pres. Shep. T. 252, 273.

(c) 2 Bl. Com. 143.

(d) 4 Cruise T. 32, c. 5, § 18;

Co. Litt. 45 b; *Jaques v. Miller*, L. R. 6 Ch. D. 153.

(e) 4 Cruise T. 32, c. 5, § 19, 20.

(f) Burton, § 847, n.

(g) 2 Pres. Shep. T. 270, n. (13).

week, for four years; and this will be a good lease for four years (a). 555.

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This estate is frequently called a term (*terminus*); because it is bounded by a certain time. So that the word term, in its technical sense, does not merely signify the period of time specified in the lease, but the estate and interest also that passes for that period; and therefore the term may expire during the continuance of the time, as by surrender, forfeiture, and the like. And hence, if a lease is granted to A. for the term of three years, and after the expiration of the said term to B. for six years, and A. surrenders or forfeits his lease at the end of one year, B.'s interest shall immediately take effect. But if the remainder had been to B. from and after the expiration of the said time, in this case B.'s interest will not commence till the time is fully elapsed, whatever may become of A.'s term (b). And hence also, a general gift of a term of years will pass all the estate and interest of the testator, without any additional words (c). 556.

Meaning of  
the word  
"term."

Sometimes the word "term" is construed, not in its technical sense, but simply to mean "period" or "space of time"; as where there is no legal term in the sense of an estate or interest for a given period (d). 557.

A lease that is to begin in futuro, as well as a common law lease in *præsenti* before entry, is called an *interesse termini* (e). An *interesse termini* is assignable and releaseable; and an underlease may be made by the person entitled to it; but it cannot be surrendered; nor will it occasion a merger (f). 558.

*Interesse  
termini.*

(a) 2 Pres. Shep. T. 270.

(b) 2 Bl. Com. 144; Co. Litt. 45 b; 1 Cruise T. 8, c. 1, § 5, 6; Watk. Conv. 3rd ed. by Prest. 16.

(c) 6 Cruise T. 38, c. 11, § 82.

(d) *Martin v. Smith*, L. R. 9 Ex.

50.

(e) 2 Pres. Shep. T. 242, 267;

Co. Litt. 46 b, 270 a.

(f) Co. Litt. 46 b; 2 Pres. Shep. T. 244, 267, n. (2), 269; Burton, § 61; Watk. Conv. 3rd ed. by Prest. 20, 21, 176—7.

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for lease  
not part  
of title to  
lease.

[It is enacted by stat. 45 & 46 Vict. c. 39, s. 4 (Appendix), that "where a lease is made under a power contained in a settlement, will, Act of Parliament, or other instrument, any preliminary contract for or relating to the lease, shall not for the purpose of the deduction of title to an intended assign form part of the title or evidence of the title to the lease."] 558a.

Tenancy  
from year  
to year.

One species of estate for years is a tenancy from year to year, so long as both parties please. This estate may be either created by express words, or by construction of law. For a tenancy from year to year (unless there is an express agreement between the parties to another effect) is always implied, where a tenement is occupied under a rent payable yearly, half-yearly, or quarterly (*a*). A tenancy from year to year continues against a grantee of the reversion (*b*). And it does not determine by the death of the tenant, but devolves to his executors or administrators (*c*). In the absence of any express agreement respecting the power of determining the tenancy by notice, a tenancy from year to year may be determined by either party at the expiration of any year of the tenancy, by giving, on one of the usual quarter days, half-a-year's notice, expiring on the quarter day on which the tenancy commenced. So that an estate from year to year consists, in the first instance, of a certain term for one year only, but if, at the end of the first half-year, either party fails to give half-a-year's notice to quit, expiring on the quarter day on which the first year will end, another year is added to the term; and in like manner a fresh year will be added to the term as often as default be made, in giving a similar half-year's notice to quit, expiring on the quarter day on which each entire year will end (*d*). Thus a tenancy commencing at Lady-day, may

(*a*) Burton, § 864.(*b*) 1 Cruise T. 9, c. 1, § 22.(*c*) 1 Cruise T. 9, c. 1, § 24.(*d*) See Burton, § 865.

be determined by a notice given on or before Michaelmas-day. But if notice is not given until after Michaelmas-day, the tenancy cannot be determined until the Lady-day after the next Lady-day (*a*). [Now, however, in consequence of stat. 46 & 47 Vict. c. 61 (Appendix), a year's notice expiring with a year of tenancy is substituted, in case of a tenancy within that Act, for the half-year's notice formerly required, but this provision does not extend to the case of a tenant who is adjudged a bankrupt, or has filed a petition for a composition or arrangement with his creditors. The landlord may, with a view to the use of land for certain specified purposes to be stated in the notice, give notice relating to part only of the holding; but the tenant is entitled within twenty-eight days to serve on the landlord a notice in writing to the effect that he accepts the landlord's notice, as notice to quit the entire holding. **559.**

A tenancy from year to year is assignable either at common law, or by statute. In his judgment in the case of *Allcock v. Moorhouse* (*b*), Jessel, M. R., says, "It is a term altogether of a peculiar kind. It is either a present, or a future interest in the land, and as such is assignable, if not at common law, at all events under the stat. 8 & 9 Vict. c. 106, s. 6. If it is a present interest it is assignable at common law; if a future interest it is assignable under the statute." **559a.**

Whether the notice to quit is given by the landlord or the tenant, the party to whom it is given is entitled to insist on it, and it cannot be withdrawn without the consent of both. That consent creates a new tenancy, to take effect at the time when the old one would have expired if the notice had not been waived (*c*). **560.**

A tenant even from year to year only is affected with

(*a*) 6 Jarm. & Byth. by Sweet,  
566, n. (*a*).

(*b*) L. R. 9 Q. B. D. (Ap.) 366.

(*c*) *Tayleur v. Wildin*, L. R. 3  
Exch. 303.

Stat. 46 & 47  
Vict. c. 61.  
The Agricultural Holdings Act,  
1883.

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constructive notice of what appears on his lessor's title : so that if his lessor is under covenant not to use the premises for a particular purpose, the tenant is bound by the covenant in equity (a). 561.

Terms  
devolve  
to the exe-  
cutor.

A lease for years, however great the number may be, cannot, by the agreement of the parties, be made to the heirs of the lessee, nor entailed on the heirs of his body; and therefore if a lease be made to J. S. and his heirs, or to J. S. and the heirs male of his body, the executors of J. S., and not his heirs, or heirs male, shall have it, and may sell the term (b). 562.

Trust to  
pay rents  
to a person  
till another  
comes of  
age.

Under a trust to pay rents and profits to a person until another person attains the age of twenty-one years, the legal personal representatives of the former will be entitled to the rents and profits until that period, in case he dies under age (c). 563.

Holding  
over.

In consequence of the stat. 11 Geo. 2, c. 19, s. 18, tenants giving written or verbal notice to quit, and holding over, shall pay double rent (d). And by the stat. 4 Geo. 2, c. 28, s. 1, where any tenant holds over after demand made and notice in writing given for delivering the possession, such person so holding over shall pay double the yearly value of the lands so detained, for so long time as the same are detained, to be recovered by action of debt, against the recovering of which penalty there shall be no relief in equity (e). The demand may be made for that purpose even after the tenancy has expired, if the landlord have done no act in the meantime to acknowledge the continuance of the tenancy; and he will thereupon be entitled to double value as from the time of such demand, if the tenant holds over (f). Where a demise is for a certain

(a) *Wicks v. Hart*, L. R. 1 Ch. Ap. 463.

(b) 2 Pres. Shep. T. 271: 1 Id. 86;  
Ch. Litt. 388 a; Watk. Conv. 3rd  
ed. by Prest. 19.

(c) *Larton v. Erdle*, 19 Beav. 321.

(d) 1 Cruise T. 9. c. 2. § 11. 12.

(e) Id. § 5.

(f) Id. § 10.

time, no notice to quit is necessary at or before the end of the term, to put an end to the tenancy. But a demand of possession and notice in writing, etc., are necessary to entitle the landlord to double value (*a*). **564.**

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Where leaseholds for years or for lives are settled upon several persons in succession, there, in the absence of any direction or indication to the contrary, the rule is, to apportion the charges for the renewal thereof between the tenant for life and the remainderman, in proportion to the enjoyment they have of the renewed lease (*b*). **565.**

Charges  
of renewal  
of lease-  
holds.

Every tenant for years has incident to and inseparable from his estate, unless restrained by special agreement, the same estovers to which tenants for life are entitled (*c*). **566.**

Estovers.

Where the determination of an estate for years is certain, the tenant is not entitled to emblements; because it was his own folly to sow when he knew he could not reap. But where a term of years is made determinable on the death of a particular person who is not the lessor, and he dies before the effluxion of the years, there the tenant is entitled to emblements. And when a tenant for life lets for years, and the term expires by the death of the lessor, the lessee was, by the old law, entitled to emblements in the same manner as a tenant for life (*d*). But by the stat. 14 & 15 Vict. c. 25, s. 1 (as we have already seen) (*e*), the lessee instead of having emblements, is to hold until the expiration of the current year. **567.**

Emble-  
ments.

[The landlord is liable to pay the outgoing tenant for unexhausted improvements according to the custom of the country. A legal tenant for life under a will is under the

Improve-  
ments.

(*a*) 1 Cruise T. 9, c. 2, § 10.

(*b*) 2 Spence's Eq. Jur. 545, 546;  
*Ainslie v. Harcourt*, 28 Beav. 311;  
*Blake v. Peters*, 1 D. J. & Sm. 345;  
*Harris v. Harris* (No. 3), 32 Beav.  
333; *Bradford v. Brownjohn*, L. R.  
3 Ch. Ap. 711.

(*c*) 1 Cruise T. 8 c. 2, § 19;  
2 Bl. Com. 144; Co. Litt. 41 b,  
55 b.

(*d*) 1 Cruise T. 8, c. 2, § 18; 2 Bl.  
Com. 145.

(*e*) *Supra*, par. 436.

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Stat. 46 & 47  
Vict. c. 61.  
The Agricultural Holdings Act,  
1883.

Long terms  
created for  
special  
purposes.

Attendant  
terms.

same liability to the outgoing tenant of the testator under a tenancy continued after the testator's death (a). But stat. 46 & 47 Vict. c. 61 (Appendix), now regulates the incidents of Agricultural Holdings.] 567a.

Long terms for years are often created for securing the repayment of money lent on mortgage, and for other purposes. Prior to the stat. 8 & 9 Vict. c. 112, such terms did not determine on the mere performance of the trusts for which they were created, unless there was a special provision to that effect; but the legal interest continued in the trustee, after they were performed; and at law the term continued to be a term in gross; as distinct and separate from the inheritance as it was at first. But in equity the term might become attendant on the inheritance by express declaration, as where the term was assigned to a trustee in trust to attend the inheritance, or in trust for the purchaser, his executors, administrators, and assigns. Again, a satisfied term might become attendant on the inheritance by mere implication; for, as equity always considers who has the right to the land in conscience, if the term was not subject to any ulterior limitation to which the inheritance was not subject, and the owner of the inheritance was entitled to the whole trust of the term, it was attendant on the inheritance by implication, unless such implication were rebutted. This was partly to protect the inheritance, and partly to keep real estates in the right channel, as otherwise the term, which is often the only valuable interest, would have gone to the executor or

- administrator, leaving the heir a mere nominal inheritance. And whether attendant by express declaration or by mere implication, the term then followed the descent to the heir, and all the alienations made of the inheritance, or of any particular estate or interest carved out of it by deed or by will, or by act of law; it was capable of being entailed

(a) *Manuel v. Norton*, L. R. 22 Ch. D. (Ap.) 769.



and limited over after a general failure of issue, provided the inheritance was so entailed and limited over; it was not forfeited for felony; it was not devisable before the late Wills Act, without the formalities requisite for devising real estate; and, in short, it was governed in equity by the same rules generally as the inheritance. **568.**

In consequence of satisfied terms being deemed terms in gross at law, but capable of being rendered completely subservient to the ownership of the inheritance in equity, they were often made of the greatest use in protecting the inheritance from mesne estates, charges, and incumbrances. Thus, if a *bonâ fide* purchaser for valuable consideration, mortgagee, lessee, or other incumbrancer, took a conveyance, lease, or assignment, defective by reason of some estate, charge, or incumbrance, subsequent to the creation of a long satisfied term for years, and prior to his own conveyance, lease, or assignment, and of which he had no notice at the time of his contract, he might effectually protect himself against all persons claiming under such estate, charge, or incumbrance, by taking an assignment of the satisfied term, whether in gross or attendant, to a trustee for himself, or by taking an assignment thereof to himself, where he took the conveyance, lease, or assignment of the estate or interest to be protected in the name of a trustee; for he might use the legal estate in such satisfied term to defend his possession during the continuance of the term; or, if he had lost the possession, to recover it (*a*). **569.**

A term for years will protect a purchaser for valuable consideration from the claim of dower, though such purchaser had notice of the marriage at the time of his purchase (*b*). But a term standing out in a trustee to attend the inheritance, will not protect a purchaser from the

(*a*) Co. Litt. 290 b; Story's Eq. Cruise T. 12, c. 3, § 6—10, 13, 16, Jur. § 998—1002, and notes; Sugd. 21, 28, 29, 31, 33, 34.  
Concise View, 477, 485, 486; 1 (*b*) 1 Cruise T. 12, c. 3, § 38.

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claim of dower, unless it is actually assigned to a trustee for him (a). 570.

Where a term for years is vested in a trustee upon an express trust, a purchaser will not protect himself by taking an assignment for such term after notice of the trust (b). 571.

Where a term for years has been assigned to a trustee for a Crown debtor, it would not protect a purchaser against the Crown debts, although he purchased *bonâ fide* and without notice ; but where the term has never been assigned to attend for the Crown debtor, but has been assigned to a trustee for a *bonâ fide* purchaser, it will protect him against the Crown debts (c). 572.

A Court of Equity will set aside a term for years in favour of a jointress. And a tenant by the curtesy is also entitled to the aid of equity against a trust term assigned to attend the inheritance and set up against him by the heir (d). 573.

An attendant term might at any time be disannexed by the proper acts of the parties in interest, and be turned into a term in gross (e). 574.

Stat. 8 & 9  
Vict. c. 112,  
as to satisfied  
terms.

By the stat. 8 & 9 Vict. c. 112, s. 1, every satisfied term which was attendant on the 31st of December, 1845, was on that day to cease, except that, if attendant by express declaration, it shall afford the same protection as it would have afforded, if it had continued to subsist, but had not been assigned or dealt with after that day. And by s. 2, every term which, after the 31st of December, 1845, shall become satisfied and attendant, shall cease immediately upon the same becoming so attendant. The words are these :— 575.

“Every satisfied term of years, which, either by express

(a) 1 Cruise T. 12, c. 3, § 43.

(b) Id. § 35.

(c) Sugd. Concise View, 484.

(d) 1 Cruise T. 12, c. 3, § 49.

(e) Story's Eq. Jur. 1002; 1 Cruise T. 12, c. 3, § 26—7.

declaration or by construction of law, shall upon the 31st day of December, 1845, be attendant upon the inheritance or reversion of any lands, shall on that day absolutely cease and determine as to the land upon the inheritance or reversion whereof such term shall be attendant as aforesaid, except that every such term of years which shall be so attendant as aforesaid by express declaration, although hereby made to cease and determine, shall afford to every person the same protection against every incumbrance, charge, estate, right, action, suit, claim, and demand as it would have afforded to him if it had continued to subsist, but had not been assigned or dealt with, after the said 31st day of December, 1845, and shall, for the purpose of such protection, be considered in every Court of Law and of Equity to be a subsisting term." (Sect. 1.) 576.

"Every term of years now subsisting or hereafter to be created, becoming satisfied after the said 31st day of December, 1845, and which, either by express declaration or by construction of law, shall after that day become attendant upon the inheritance or reversion of any lands, shall immediately upon the same becoming so attendant absolutely cease and determine as to the land upon the inheritance or reversion whereof such term shall become attendant as aforesaid" (a). (Sect. 2.) 577.

"In the construction and for the purposes of this Act, unless there be something in the subject or context repugnant to such construction, the word 'lands' shall extend to all freehold tenements and hereditaments, whether corporeal or incorporeal, and to all such customary lands as will pass by deed, or deed and admittance, and not by surrender, or any undivided part or share thereof respectively; and every word importing the singular number only shall extend and be applied to several persons or things as well as one person or thing; and every word importing the

(a) See *Anderson v. Pignet*, L. R. 11 Eq. 329; reversed, 8 Ch. Ap. 180.

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masculine gender only shall extend and be applied to a female as well as a male." (Sect. 3.) 578.

According to the true construction of this statute, a satisfied term was intended to protect the person for whose benefit it was assigned to attend the inheritance; for the statute does not mean that the term is to subsist to protect the party entitled to the inheritance, in whomsoever the right may be shown to be. So that the term cannot be set up by a person claiming adversely to the person for whose benefit the assignment was made (a). 579.

The modern doctrine, contrary to former decisions, is, that down to the passing of the stat. 8 & 9 Vict. c. 112, the surrender of a term which had been assigned to attend the inheritance is not to be presumed from mere lapse of time (b). Where a term has been assigned to attend the inheritance, a surrender ought not to be presumed, unless there has been a dealing with the estate in a way in which reasonable men and men of business would not have dealt with it unless the term had been put an end to (c). 580.

Terms for years in copyholds may be created by surrender; and these are true customary estates. But the practice is not usual (d). 581.

Stat. 44 & 45  
Vict. c. 41.  
The Con-  
veyancing  
and Law of  
Property  
Act, 1881.  
Enlargement  
of  
residue of  
long term  
into fee  
simple.

[Under the provisions of stat. 44 & 45 Vict. c. 41, s. 65 (Appendix), the residues of long terms subsisting at or after the 1st of January, 1882, other than those excepted as stated in par. 581e, can now be enlarged into estates in fee simple. Thus where a residue unexpired of not less than two hundred years of a term, which, as originally created, was for not less than three hundred years, is subsisting in

(a) *Doe d. Cadwalader v. Price*,  
16 M. & W. 603.

(b) *Doe d. Earl of Egremont v.*  
*Langdon*, 12 A. & E. (N. S.) 711;  
*Cottrell v. Hughes*, 15 Com. Bench

R. 532.

(c) *Wilde*, C. J., in *Garrard*,  
dem., *Tuck*, ten., 8 Mann. Gr. &  
Sc. 249.

(d) *Burton*, § 1314.

[land, whether being the whole land originally comprised in the term, or part only thereof, without any trust or right of redemption affecting the term in favour of a freeholder, or other person entitled in reversion expectant on the term, and without any rent, or with merely a peppercorn rent or other rent having no money value, originally so incident, which subsequently has been released, or has become barred by lapse of time, or has in any other way ceased to be payable, then the term may be enlarged into a fee simple; and each of the following persons (namely), (i.) any person beneficially entitled in right of the term to possession of any land comprised in the term; (ii.) any person being in receipt of income as trustee in right of the term, or having the term vested in him in trust for sale; and (iii.) any person in whom, as personal representative of any deceased person, the term is vested, and whether the term is subject to any incumbrance or not, is empowered, as far as regards the land to which he is entitled, or in which he is interested, in right of the term, in any such character as aforesaid, by deed to declare to the effect that, the term shall be enlarged into a fee simple. Thereupon the term becomes enlarged accordingly, and the person in whom the term was previously vested, acquires in the land a fee simple instead of the term (s. 65 (1), (2), and (3)). **581a.**

The estate in fee simple so acquired is subject to all the same trusts, powers, executory limitations over, rights, and equities, and to the same obligations of every kind, as the term would have been subject to if it had not been enlarged (s. 65 (4)). **581b.**

The fee simple is subject to the same rights, etc., as the term.

But where any land so held for the residue of a term has been settled in trust by reference to other land, being freehold land, so as to go along with that other land as far as the law permits, and, at the time of enlargement, the ultimate beneficial interest in the term whether subject to any

The fee simple is to be settled in certain cases.

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[subsisting particular estate or not, has not become absolutely and indefeasibly vested in any person, then the estate in fee simple acquired by enlargement, without prejudice to any conveyance for value previously made by a person having a contingent or defeasible interest in the term, must, by virtue of the provisions of the same statute, be conveyed and settled in like manner as the other land being freehold land, and until so conveyed and settled, devolves beneficially as if it had been so conveyed and settled (s. 65 (5)). 581c.

The fee simple includes mines and minerals.

The estate in fee simple acquired by enlargement, whether the term was originally created without impeachment of waste or not, includes the fee simple of all mines and minerals which, at the time of enlargement, have not been severed in right, or in fact, or have not been severed or reserved by an inclosure act or award (s. 65 (6)). 581d.

Stat. 45 & 46  
Vict. c. 39,  
The Conveyancing  
Act, 1882.

The operation of these provisions has been restricted by stat. 45 & 46 Vict. c. 39, s. 11 (Appendix), which enacts that "section sixty-five of the Conveyancing Act of 1881, shall apply to and include, and shall be deemed to have always applied to and included, every such term as in that section mentioned, whether having as the immediate reversion thereon the freehold or not; but not (i.) any term liable to be determined by re-entry for condition broken; or (ii.) any term created by sub-demise out of a superior term, itself incapable of being enlarged into a fee simple."] 581e.

## II. *Of an Estate at Will.*

Definition of this estate.

An estate at will is an estate which simply confers a right to the possession of lands or tenements for such indefinite period as both parties shall concur in choosing that it shall continue. 582.

Created by

An estate at will may be created by words expressive of

an intention that the one party shall have the possession at the will of both or either of them. But although this estate may be created by words which only express that the estate is to be at the will of the lessor or of the lessee, yet every estate at will is in law at the will of both parties (a). **583.**

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express  
words.

An estate at will is determined by the death of either party (b); except that if either party dies before the rent is due, the estate at will, if it is in a house, shall continue until the next rent day; and, if it is in lands, commencing at Michaelmas, it shall continue until the summer profits are received by the representatives of the tenant. **584.**

How this  
estate is  
deter-  
mined.

It may also be determined by the dissent of either party (c). The lessor may determine it by any express declaration that the lessee shall hold no longer, which must either be made on the land, or else notice of it given to the lessee (d). But any act of ownership exercised by the landlord which is inconsistent with the nature of this estate, will also operate as a determination of it. Thus, if he enters on the land and cuts down trees demised, or makes a feoffment or a lease for years to commence immediately, the estate at will is thereby determined. On the other hand, any act of desertion, or any act inconsistent with this estate which is done by the tenant, will also operate as a determination thereof. Thus, if the tenant assigns over the land to another, or commits an act of waste, his estate is thereby determined. But a verbal declaration by the lessee that he will not hold the lands any longer, does not determine the estate, unless he also waives the possession (e). **585.**

(a) See 1 Cruise T. 9, c. 1, § 5; Co. Litt. 55 a; Watk. Conv. 3rd ed. by Prest. 2—4.

(b) Id. § 13, and c. 2, § 1.

(c) Watk. Conv. 3rd ed. by Prest.

1, 2.

(d) 1 Cruise T. 9, c. 1, § 11; Co. Litt. 55 b.

(e) Id. § 12; Co. Litt. 55 b, and n. 15.

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TITLE 6.

Rent and emblements, on determination of the tenancy.

Although either party may determine the tenancy at any time, yet neither party can thereby unfairly prejudice the other in regard to the rent or emblements. So that, if the lessee determines the tenancy before the day on which the rent is due, he must still pay the rent up to that day ; but where the lessor determines the tenancy at such a time, he loses the rent. On the other hand, if the lessor determines the tenancy before the corn or other produce is reaped or gathered in, the lessee shall still have the emblements, and free ingress, egress, and regress, to take them away ; but where the lessee determines the tenancy at such a time, he loses the emblements (a). 586.

Estate at will is not assignable.

As the lessor may determine the tenancy at any time, a tenant at will has nothing that can be granted by him to a third person. And therefore, if a tenant at will assigns over his estate to another, who enters on the land, he is a disseisor (b). 587.

It seldom arises.

It is no longer usual to create tenancies at will by express words ; and the Courts lean strongly against implying them, and incline rather to construe demises for uncertain terms or void leases, especially where an annual rent is reserved, as creating tenancies from year to year (c). And even where a parol agreement is void under the Statute of Frauds, it is a tenancy from year to year ; because, though the statute says it shall be only an estate at will, the meaning of the statute is, that such an agreement shall not operate as a term (d). 588.

(a) 2 Bl. Com. 145—7 ; 1 Cruise T. 9, c. 1. § 8, 13 ; Co. Litt. 55 a, 55 b, 56 a.

(b) 2 Bl. Com. 145 ; 1 Cruise T. 9, c. 1 ; § 6, Burton, § 19 ; Watk. Conv.

3rd ed. by Prest. 1.

(c) 2 Bl. Com. 147 ; 1 Cruise T. 9, c. 1, § 1—21 ; Watk. Conv. 3rd ed. by Prest. 3.

(d) 1 Cruise T. 9, c. 1. § 20, 21.



### III. *Of an Interest by Sufferance.*

An interest by sufferance is an interest which arises where a person comes into possession of land by lawful title otherwise than by act of law, but keeps it longer than he has any title to retain it. Thus, if a tenant pour autre vie continues in possession after the death of cestui que vie, or a tenant for years after his term is expired, or a lessee at will after the death of the lessor, without any fresh leave from the owner of the estate, the person so holding over is a tenant at sufferance. But no man can be tenant at sufferance of the Sovereign : such a tenant holding over is considered an absolute intruder (a). 589.

PART II.  
TITLE 6.  
Definition.

Where a person comes to a particular estate by act of law, and continues to hold it beyond the proper time, as if a guardian after the full age of the heir continues in possession, he is not a tenant at sufferance, but an abator (b). 590.

Holding over by a person who comes in by act of law.

A tenant by sufferance is in, not by the consent, but only by the laches of the owner ; so that there is no privity between them ; and hence, the owner cannot release to the tenant by sufferance (c). 591.

Absence of privity to support a release.

### IV. *Of Chattel Interests created for special Purposes.*

There are some interests created for the purpose of raising money out of lands or tenements, which are considered as chattel interests. 592.

Thus, where a testator devises land to his executors, "for payment of his debts and until his debts be paid," this gives them a chattel which has no relation to the life

Interests by devise for payment of debts.

(a) 2 Bl. Com. 152; 1 Cruise T. 9, c. 2, § 12; Co. Litt. 57 b, 270 b, n. 1.

(b) 1 Cruise T. 9, c. 2, § 2; Co. Litt. 271 a.

(c) Co. Litt. 270 b, and n. 1.

PART II.  
TITLE 6.

of the person in whom it is vested, but is bounded by the period when the purpose for which it was created may happen to be accomplished; so that, if the debts be paid in the surviving executor's lifetime, it will cease; and on the other hand, if they be not paid in his lifetime, it will go to his executors, instead of ceasing upon his death (a). 593.

Interests  
for raising  
arrears of  
rent.

And where the owner of land grants a rent out of it to another, with a clause enabling him, when the rent shall be in arrear, to enter upon the land, and take the profits until the arrears be satisfied, if the grantee of the rent enters pursuant to that clause, he has a chattel interest, the duration of which is bounded by the accomplishment of the required purpose, namely, the raising the amount of such arrears (b). 594.

Devise to  
a wife to  
maintain  
children.

Again, if a man devises lands to his wife till his son comes of age, to provide his children with necessities, this is a chattel interest which does not determine in case of the death of the wife before the son comes of age, but goes to her executors (c). 595.

Statute  
merchant,  
statute  
staple, and  
elegit.

Of a similar nature are estates by statute merchant, statute staple, and elegit, the duration of which is measured by the satisfaction of a debt (d). These will be more particularly noticed in a subsequent part of this work. 596.

(a) Co. Litt. 42 a; Burton, § 866;  
1 Cruise T. 8, c. 1, § 5.  
(b) See Burton, § 867.

(c) 6 Cruise T. 38, c. 13, § 46.  
(d) Burton, § 868; Co. Litt.  
42 a.

## TITLE VII.

### OF ESTATES OR INTERESTS IN SEVERALTY AND IN COMMUNITY.

WITH reference to the several or joint character of the ownership, real property is held— PART II.  
TITLE 7.

I. In severalty.

II. In community : *i.e.*,

1. In joint tenancy,
2. By entireties,
3. In coparcenary,
4. In common. 597.

Things personal may belong to their owners not only in severalty, but also in joint tenancy, or in common, or by entireties. But chattels cannot be vested in coparcenary, because they do not descend from the ancestor to the heir (*a*). 598.

(*a*) 2 Bl. Com. 399; Co. Litt. 182 a ; Litt. s. 319, 321.

## CHAPTER I.

OF AN ESTATE IN JOINT TENANCY, AND OF A TENANCY  
BY ENTIRETIES.

## SECTION I.

*Of the General Law as to Joint Tenancy.*

PR. II. T. 7,  
CH. 1, S. 1.

Definition.

AN estate or interest in joint tenancy is a joint interest of two or more persons during their joint lives, with benefit of survivorship between or among them, created by a limitation of real or personal property for any estate, to two or more persons as joint tenants or in joint tenancy, or to them indefinitely, without any words importing a distinctness of interest in each. Thus, if a life estate is given to A., B., and C., indefinitely, and one dies, the whole belongs to the other two, for their lives, by survivorship; and if a second dies, the whole belongs to the sole survivor for his life. So, if an estate in fee is given to A. and B., each during their joint lives has a fee, but on the death of one of them the whole estate belongs to the survivor in fee (a). So when legacies are given "to a person and her children," without any words of severance, she having children at the date of the will, or "to my relatives in America," the legatees will take as joint tenants (b). And under a limitation to the next of kin simpliciter, the father, mother, and children, if living, will all take as joint tenants (c). The grant of an estate to two, and the sur-

(a) See 2 Bl. Com. 180; 2 Cruise T. 18, c. 1, § 2, and T. 38, c. 14, § 3; Litt. s. 277, 280, 283; 2 Jarm. Wills, 2nd ed. 207; *Morgan v. Britten*, L. R. 13 Eq. 28.

(b) 2 Rep. Leg. by White, 1360; *Eagles v. Le Breton*, L. R. 15 Eq. 148.

(c) *Withy v. Mangles*, 4 Beav. 358; 10 Cl. & Fin. 215.

vivor of them, and the heirs of the survivor, does not make them joint tenants in fee, but gives them an estate of freehold during their joint lives, with a contingent remainder to the survivor (a). 599.

Fr. II. T. 7.  
Ch. 1, s. 1.

All natural persons may be joint tenants; but bodies politic or corporate cannot be joint tenants with each other. Nor can the Sovereign or any other corporation, whether sole or aggregate, be joint tenant with a natural person (b). 600.

Who may  
be joint  
tenants.

Joint tenants necessarily have equal shares (c). But there are some cases in which there may be a joint tenancy without an equal right of survivorship. Thus, if lands are let to A. and B. during the life of A., if B. dies, A. shall have all by survivorship; but if A. dies, B. shall have nothing (d). 601.

Equality.

Cases where  
only one  
has a right  
of survivor-  
ship.

If a gift is made to two persons for their lives, who are not husband and wife, this is understood as extending to the life of the survivor, and the parties are joint tenants (e). 602.

Gift to two  
for their  
lives.

If a gift is made to two persons of the same sex, or two persons of different sexes who cannot lawfully intermarry, or two persons of one sex and a third of another sex, and to the heirs of their bodies, or the heirs of their respective bodies, they have an estate in joint tenancy for their lives, and yet they have several inheritances in tail (f). And so, where a testatrix devised to two women, M. and J., to hold to them, their heirs and assigns, for ever; but in case they should both die without issue, then she devised to two others, to hold to them, their heirs and assigns, for ever, as

Joint  
tenancy for  
life, with  
several  
inherit-  
ances in  
tail.

(a) Co. Litt. 191 a, n. 1.

(b) 2 Cruise T. 18, c. 1, § 38.

(c) Watk. Conv. 3rd ed. by Prest. 79.

(d) 2 Cruise T. 18, c. 1, § 32.

(e) Burton, § 736. See remarks of Sir J. Romilly, M. R., in *Moffatt*

v. *Burnie*, 18 Beav. 213.

(f) 2 Cruise T. 18, c. 1, § 7—10; Co. Litt. 182 a—184 a; 2 Jarm. Wills, 2nd ed. 206; Watk. Conv. 3rd ed. by Prest. 80; *Re Tiverton Market Act*, *Ex parte Tanner*, 20 Beav. 374.

Pr. II. T. 7,  
Ch. 1, s. 1.

tenants in common ; it was held that M. and J. did not take as tenants in common for life, but as joint tenants for life, with several inheritances in tail ; so that on the death of M. leaving issue, J. became entitled to the whole for life, and after the death of J. without issue, the heirs of the body of M. became entitled to it (a). Persons having a joint estate for life with several inheritances in tail cannot convey away the inheritance distinct from their ownership for life, because it is divided only in supposition and consideration of law (b). 603.

Joint  
tenancy  
cannot arise  
by act of  
law.

Joint tenancy cannot arise by descent or act of law, but merely by purchase or acquisition by the act of the parties (c). 604.

Exceptions  
to joint  
tenancy in  
equity.

Except in the case of trusts executory (d), limitations which confer an estate in joint tenancy at law will have the same effect in equity, when there are no circumstances which afford grounds for a departure from the rule of law ; so that, where two or more persons purchase lands, and advance the money in equal shares, and take a conveyance to them and their heirs, this is a joint tenancy. But joint tenancy is not favoured in equity, because "equity delighteth in equality," and therefore leans against the right of survivorship, as giving the survivor a great advantage over the other party ; so that Courts of Equity will lay hold of any circumstances which will enable them to vary in this respect from their practice of following the law. Thus, if two persons advance [money on mortgage to them jointly, and one dies, his representatives are, in equity, entitled to his proportion ; but the receipt of the other discharges the mortgagor (e)]. So, if two persons jointly purchase an estate, and pay unequal proportions of the purchase money, and

(a) *Forrest v. Whiteray*, 3 Exch. 367.

(b) 2 Cruise T. 18, c. 1, § 10 ; 2 Pres. Shep. T. 243.

(c) 2 Bl. Com. 181; *Watk. Conv.*

3rd. ed. by Prest. 79.

(d) 2 Jarm. Wills, 2nd ed. 210.

(e) 44 & 45 Vict. c. 41, s. 61, in Appendix.

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Ch. 1, s. 1.

take the conveyance in their joint names ; in case of the death of either of them, there will be no survivorship, but they will be deemed to be purchasers in the nature of partners, and to have intended to hold the estate in proportion to the sum which each advanced (*a*). And where real or personal estate is purchased for a trade partnership purposes and on a trade partnership account, the legal estate, in whomsoever it may be vested, is in equity deemed to be partnership property, not subject to survivorship (*b*). 605.

Joint tenants, as such, have one and the same interest. As joint tenants, one cannot have one quantity or portion of ownership or interest, and another a different quantity or portion of ownership or interest. Thus, one joint tenant, as such, cannot be tenant for life, and another for years; one cannot be tenant in fee, and another tenant in tail. But the estate of one joint tenant in fee may be subject to divestment in the event of his becoming a survivor, and then a particular event happening, such as that of his dying without issue (*c*). And, on the other hand, one joint tenant, in addition to the portion of ownership or interest in respect of which he is denominated a joint tenant, may have an ulterior portion of ownership or interest, as tenant in severalty. Thus, if land is granted to A. and B. for their lives, and to the heirs of A., here A. and B. are joint tenants of the freehold during their respective lives, and A. has a remainder in fee in severalty. And if land is given to A. and B. and the heirs of the body of A., here both have a joint estate for life, and A. has a several remainder in tail (*d*). Yet it would seem, that, for the

Unity of  
interest.

(*a*) Story's Eq. Jur. § 1206; Coote Mortg. 3rd ed. 163; 2 Cruise T. 18, c. 1, § 33; 2 Spence's Eq. Jur. 206, 207, n. (*a*), 214; 1 Sugd. Concise View, 533.

(*b*) Story's Eq. Jur. § 1207; 2 Spence's Eq. Jur. 207; 2 Bl.

Com. 399; Sugd. Concise View, 553.

(*c*) *Edwards v. Jones*, 33 Beav. 348.

(*d*) See 2 Bl. Com. 181; 2 Cruise T. 18, c. 1, § 4, 5, 6, 12, 13; Litt. s. 285.

Pr. II. T. 7, Ch. 1, s. 1. purpose of granting, both estates of A. are consolidated, so that the fee simple or fee tail cannot be granted as an interest distinct from the estate for life (a). 606.

Unity of title. Joint tenants have also unity of title: their estate must be created by one and the same act, whether legal or illegal; as by one and the same grant, or by one and the same disseisin. But, although some of the persons to whom an estate is limited be in by the common law, and others by the Statute of Uses, yet they will take in joint tenancy (b). 607.

Unity of time. At the common law, unity of time is necessary: the interests of the joint tenants must vest at one and the same time. But in the case of deeds under the Statute of Uses, and in the case of devises and bequests, this is not necessary (c). 608.

Unity of possession. Lastly, there must be unity of possession. Joint tenants are said to be seised per my et per tout, which is explained by some writers to mean, by the moiety, part, or share, and by the whole, and by other writers, by no part and by the whole, that is, of nothing separately, but of the whole conjunctively. Each has an undivided moiety of the whole, and not the whole of an undivided moiety (d). And they have but one joint freehold (e). 609.

Alienation or forfeiture. But although each joint tenant is said to be seised of the whole, yet he cannot alien or forfeit more than his own share; and if all join in a conveyance, each gives but his own part (f). 610.

Grants or charges. If one joint tenant grants a common or a way, or makes

(a) Co. Litt. 184 b, and n. 2.

(b) 2 Cruise T. 18. c. 1, § 23.

(c) See 2 Bl. Com. 181; 2 Pres. Shep. T. 235; Co. Litt. 188 a, and n. 13; 2 Cruise T. 18, c. 1, § 18; Watk. Conv. 3rd ed. by Prest. 81—2; 2 Jarm. Wills, 2nd ed. 207—210; *Akenworthy v. Ward*, 11 Hare 196;

*McGregor v. McGregor*, 1 D. F. & J. 63.

(d) 2 Bl. Com. 182; Co. Litt. 186 a; the Law-French Dict.: 1 Ste. Com. 4th ed. 360 (n.); 6 Jarm. & Byth. by Sweet, 588.

(e) Co. Litt. 188 b.

(f) Burton, § 36; Co. Litt. 186 a.



a charge, as distinguished from an alienation, it is good as against himself; but if he dies in the lifetime of the other, it does not affect the survivor; for *jus accrescendi præfertur oneribus* (a). So, if one joint tenant acknowledges a recognisance or a statute, and dies before execution had, it shall not be executed afterwards. But if execution be sued in the life of the conusor, it shall bind the survivor (b). **611.**

If there are two joint tenants in fee or for life, and one of them makes a lease for years to a stranger, it will be good against the survivor, even though such lease does not commence till after the death of the joint tenant who made it; because it is a kind of alienation (c). **612.**

Estates which are held in joint tenancy are not subject to dower or curtesy (d). **613.**

If the lessee of two joint tenants surrenders his lease to one of them, it shall enure to both, because of the privity or relation of their estate (e). **614.**

One joint tenant cannot make a feoffment, as such, of his part of the land to his companion; because the latter is already seised per my et per tout. But he may release to his companion; and an intended deed of feoffment by one joint tenant to another would operate as a release (f). And even joint tenants of a copyhold (having been admitted) may convey their shares to each other by release (g). **615.**

Upon the same principle of entirety of interest, joint tenants could not grant, or bargain and sell, or surrender, or devise to each other, or exchange with each other, at common law. But one may lease his part to the other,

(a) 2 Cruise T. 18, c 1, § 53; Co. Litt. 184 b, 185 a.

(b) Co. Litt. 184 b.

(c) 2 Cruise T. 18, c. 1, § 57; Litt. s. 289; Co. Litt. 186 a.

(d) 1 Cruise T. 18, c. 1, § 52; and T. 5, c. 2, § 22.

(e) 2 Bl. Com. 182.

(f) 1 Pres. Shep. T. 205; 2 Id. 327; 2 Cruise T. 18, c. 2, § 22; 4 Id. T. 32, c. 6, § 23; Watk. Conv. 3rd ed. by Prest. 82—3.

(g) Burton, § 1303, n.; Co. Litt. 59 a. n. 2.

Fr. II. T. 7.  
Ch. 1, s. 1.

Lease by  
one joint  
tenant.

Dower and  
curtesy.

Surrender  
by lessee.

Conveyance  
by one joint  
tenant to  
another.

Pr. II. T. 7, with the usual incidents of a reversion and the right to  
 Ch. 1, s. 1. distrain for rent (a). **616.**

For the same reason that a feoffment was not the proper mode of conveyance by one joint tenant to another, an equivalent to livery, that is, a conveyance by lease and release was not necessary. Yet, before the abolition of the lease for a year, conveyancers, from an abundance of caution, generally adopted the lease and release, fearing that the joint tenancy might have been previously severed; in which case a mere release would not have been sufficient (b). **617.**

## SECTION II.

### *Of the Destruction of Joint Tenancy.*

Pr. II. T. 7, I. An estate in joint tenancy is destroyed by the destruc-  
 Ch. 1, s. 2. tion of the unity of title. **618.** Thus,

I. Destruction of unity of title.

By alienation or lease to a stranger.

1. An estate in joint tenancy may be destroyed by the alienation of one joint tenant to a stranger, as it destroys the unity of title (c). And where there are only two joint tenants, the joint tenancy is entirely destroyed by such alienation. But where there are three or more joint tenants, it is only destroyed as to the share of the alienor. Thus, if one of three joint tenants conveys away his share, the two others will continue to be joint tenants between themselves; but they are tenants in common relatively to the alienee, and he is simply a tenant in common (d). And if one of two joint tenants in fee leases for life, or if one of two joint tenants for years leases for years, the joint tenancy

(a) Co. Litt. 186 a; Watk. Conv. 3rd ed. by Prest. 82; *Comper v. Fletcher*, 6 Best & Sm. 464.

(b) 6 Jarm. & Byth. by Sweet, 588; Watk. Conv. 3rd ed. by Prest. 83, 162.

(c) 2 Bl. Com. 185; 2 Cruise T. 18, c. 2, § 8; *Outram v. Maudslayi*, 17 Ch. D. 391.

(d) See Litt. s. 292, 294; 2 Bl. Com. 186; Burton, § 36—38.

is thereby severed (a). But if, in the first case, the tenant for life dies in the lifetime of both the joint tenants, they become joint tenants again (b). In the case of a joint tenancy for a term for years, a mortgage is a severance (c). And an agreement to alien by an adult will operate as a severance in equity (d). But articles of agreement by an infant, though made in consideration of marriage, will not operate as a severance of a joint tenancy (e). And a devise can in no case operate as a severance of a joint tenancy; it being a maxim of law that *jus accrescendi præfertur ultimæ voluntati* (f). And as, until the Wills Act, the law only considered what estate the devisor had at the time of making his will, without regard to any subsequent event, a devise by a joint tenant who afterwards severed the joint tenancy, was void, because the devisor was joint tenant when he made his will (g). But the surrender of one of the joint tenants of copyholds to the use of his will, operated, as it still does, as a severance of the estate (h). 619.

FR. II. T. 7,  
CH. 1, s. 2.

An alienation of part of the property, operates as a severance of the joint tenancy as to that part (i). 620.

2. An estate in joint tenancy may also be destroyed by the alienation of one joint tenant to another, as that also destroys the unity of title (k). 621.

By aliena-  
tion of  
one joint  
tenant to  
another.

If there are but two joint tenants, and one releases to the other, the joint tenancy is entirely destroyed. But if there are three joint tenants, and one of them releases by deed to one of his companions all the right which he had in the land, the releasee has a third part of the land with

(a) 2 Cruise T. 18, c. 2, § 11, 12 :  
Litt. s. 302.

(b) Co. Litt. 193 a, 214 a.

(c) 2 Cruise T. 18, c. 2, § 13.

(d) Id. § 20, 21 ; Sugd. Concise  
View, 147.

(e) 2 Cruise T. 18, c. 2, § 17.

(f) 2 Cruise T. 18, c. 2, § 19 ; Co.  
Litt. 185 a, 185 b.

(g) 6 Cruise T. 38, c. 3, § 28.

(h) 6 Cruise T. 38, c. 4, § 3 ;  
Co. Litt. 59 b.

(i) Co. Litt. 193 b.

(k) 2 Cruise T. 18, c. 2, § 22.

Pr. II. T. 7,  
Ch. 1, s. 2.

himself and his companion in common, and he and his companion hold the remaining two parts in joint tenancy. If, however, one joint tenant releases to all the others, they are in from the first feoffor or grantor, and not from him who released, and they continue to hold in joint tenancy (*a*). **622.**

II. Destruction of unity of interest.

II. An estate in joint tenancy is destroyed by the destruction of the unity of interest, which may be caused either by the act of the parties, or by the operation of law (*b*). Thus, if one of two or more joint tenants for life acquires, by purchase or descent, the reversion in fee, the joint tenancy is thereby severed (*c*). And if a lease is made to two men for their lives, and afterwards the lessor grants the reversion to them and the heirs of their two bodies, the joint tenancy is severed, and they are tenants in common in possession (*d*). **623.**

III. Destruction of unity of possession.  
Partition.

III. An estate in joint tenancy is destroyed by the destruction of the unity of possession. Thus, joint tenants may sever the joint tenancy by a voluntary partition among themselves (*e*), or the [Chancery Division of the High Court of Justice] or the County Court may make partition (*f*). **624.**

At law, voluntary partition by joint tenants must at all times have been made by a deed, except where the estate was only for years, when they might make partition without deed (*g*). But by 7 & 8 Vict. c. 76, s. 3, and 8 & 9 Vict. c. 106, s. 3, a deed is necessary to the partition of leasehold as well as freehold hereditaments. A written agreement to make partition operates, however, as a severance of a joint tenancy in equity, though the legal estate is still held in joint tenancy (*h*). But an agreement by

(*a*) 2 Cruise T. 18, c. 2, § 24; 2 Bl. Com. 186; Litt. s. 304.

(*b*) 2 Cruise T. 18, c. 2, § 2.

(*c*) 2 Bl. Com. 185, 186; 2 Cruise T. 18, c. 2, § 4, 6.

(*d*) Co. Litt. 182 b.

(*e*) 2 Cruise T. 18, c. 2, § 29.

(*f*) See Story's Eq. Jur. § 650—8; 31 & 32 Vict. c. 40, s. 12.

(*g*) 2 Cruise T. 18, c. 2, § 29; Co. Litt. 169 a, 187 a.

(*h*) 2 Cruise T. 18, c. 2, § 45—6.

the husbands of two joint tenants to make partition, with a partition made under such an agreement, will not bind the inheritance of the wives (a). **625.**

Pr. II. T. 7,  
Ch. 1, s. 2.

IV. Joint tenancy may be severed by mutual wills, whereby each testator leaves joint property to the other for life only, and after the death of the survivor, over to others, and whereby a tenancy in common was created (b). **625a.**

IV. Severance by mutual wills.

V. An estate in joint tenancy may also be destroyed, by the devolving of all the shares on one of the joint tenants by survivorship, by which he acquires an estate in severalty (c). **626.**

V. Union of all the shares in the same person.

### SECTION III.

#### *Of a Tenancy by Entireties (c c).*

This is a tenancy which arises when a conveyance, devise, or bequest is made to husband and wife, in which case they do not take by moieties, but, inasmuch as they are one in law, each has the entirety, and they are called tenants by entireties (d). **627.**

Pr. II. T. 7,  
Ch. 1, s. 3.  
Definition.

When a bequest is made to husband and wife for their lives, they take as tenants by entireties for their joint lives and the life of the survivor (e). **628.**

Bequest to husband and wife for their lives.

If a conveyance or devise is made to a man and woman before marriage, and afterwards they marry, the husband and wife have moieties between them (f). **629.**

Conveyance or devise before marriage.

[Formerly under a conveyance, devise, or bequest to husband and wife, and a third person, the latter had a moiety

Conveyance, devise, or bequest to husband

(a) 2 Cruise T. 18, c. 2, § 47.

(b) *In re Wilford's Estate, Taylor v. Taylor*, L. R. 11 Ch. D. 267.

(c) 2 Cruise T. 18, c. 2, § 49.

(c c) See *infra*, par. 631a.

(d) 2 Cruise T. 18, c. 1, § 45; Watk. Conv. 3rd ed. by Prest. 249; Tudor's Leading Cases in Conv. 730;

*Atcheson v. Atcheson*, 11 Beav. 485; *Ward v. Ward*, L. R. 14 Ch. D. 506; *In re Bryan, Godfrey v. Bryan*, L. R. 14 Ch. D. 516.

(e) *Moffatt v. Burnie*, 18 Beav. 211; *In re Bryan, Godfrey v. Bryan*, L. R. 14 Ch. D. 516.

(f) Co. Litt. 187 b.

Pr. II. T. 7,  
Ch. 1, s. 8.

and wife  
and some  
other person  
or persons.

for his share, and the husband and wife took the other moiety between them, being regarded as] one person in law (a). But where a testatrix gave the residue of her real and personal estate equally between her brother, her sister, her nephew W. and E. his wife, and E. was niece of the testatrix, so that husband and wife were equally of kin to the testatrix, the husband and wife each took a share, and not merely one share between them (b). 630.

Alienation  
by the  
husband.

No alienation by either of the married couple will prejudice the other, when they are tenants by entireties for life, in tail, or in fee; but if the husband aliens and survives, the alienation will be binding upon him and his heirs (c). 631.

Stat. 45 & 46  
Vict. c. 75.  
The Married  
Woman's  
Property  
Act, 1882.

[The law as to tenancy by entireties, must be regarded as modified by the changes in the legal position of husband and wife with respect to the property of the wife, introduced by stat. 45 & 46 Vict. c. 75 (Appendix), which abolishes to some extent the old legal doctrine that a husband and wife are one person. For example, in the case of a gift by will, of real and personal estate to A., and to B. and C. his wife, to and for their own use and benefit absolutely, it has recently been decided that having regard to that Act A. B. and C. take in thirds as joint tenants, C. taking her share for her separate use (d).] 631a.

(a) See Burton, § 757; Litt. s. 291; Watk. Conv. 3rd ed. by Prest. 249; 2 Jarm. Wills, 2nd ed. 205; *In re Wylde*, 2 D. M. & G. 724; and see *infra*, par. 631 a.

(b) *Warrington v. Warrington*,

2 Hare 54.

(c) 1 Pres. Shep. T. 131; Watk. Conv. 3rd ed. by Prest. 249; 2 Jarm. Wills, 2nd ed. 205.

(d) *In re March, Mander v. Haris*, L. R. 24 Ch. D. 222.

## CHAPTER II.

## OF AN ESTATE IN COPARCENARY.

AN estate in coparcenary, by the common law, is an estate in fee or in tail, held by two or more females, to whom it has descended, or by the representatives of such females in an uninterrupted course of descent from them, whether such representatives are male or female (*a*). **632.**

PART II.  
T. 7, CH. 2.  
Definition.

Parceners always claim by descent; and hence it follows, that if two sisters purchase land, to hold to them and their heirs, they are not parceners, but joint tenants; and that no estates can be held in coparcenary but estates of inheritance (*b*). **633.**

Remarks  
in illustration.

Parceners have a unity, but not an entirety of interest. As between themselves, they are properly entitled each to the whole of a distinct moiety (*c*), and therefore there is no jus accrescendi or right of survivorship between them; for each part descends severally to their respective heirs, though the unity of possession continues. And as long as the land continues in a course of descent, and united in possession, so long are the tenants thereof called coparceners, or for brevity parceners, and make but one heir whether they be male or female, or whether lineally or collaterally related to the person from whom the estate first descended in coparcenary (*d*). **634.**

But, besides parceners by the common law, there are also parceners by particular custom, where lands descend,

Parceners  
by custom.

(*a*) See 2 Bl. Com. 187, 188; 2 Cruise T. 19, § 1; Litt. s. 241, 242; Watk. Conv. 3rd ed. by Prest. 77.

(*b*) 2 Bl. Com. 188; Litt. s. 254; Watk. Conv. 3rd ed. by Prest. 77.

(*c*) 2 Bl. Com. 187—8; Co. Litt.

164 a; 2 Cruise T. 19, § 6; but see 6 Jarm. & Byth. by Sweet, 589.

(*d*) 2 Bl. Com. 187—8; 2 Cruise T. 19, § 1, 6; Litt. s. 241—2; Co. Litt. 163 b, 164 b; Watk. Conv. 3rd ed. by Prest. 58, 77.

PART II.  
T. 7, CH. 2.

as in gavelkind, to all the males in equal degree, as sons, brothers, uncles, etc. (a). 635.

Curtsey and  
dower.

Curtsey and dower are incident to estates held in coparcenary, as no survivorship takes place. But in such a case dower can only be assigned in common (b). 636.

Conveyance  
by one co-  
parcener to  
another.

Coparceners may, and always might, convey to each other, either by release, in respect of their privity of estate or by feoffment, in respect of their distinctness of interest as between themselves (c). And they may now convey to each other by a statutory grant (d). 637.

Destruction.

An estate in coparcenary may be destroyed : 1. By partition, which disunites the possession, converting the estate into two or more estates in severalty. 2. By alienation, which disunites the title and may disunite the interest, changing the estate into a tenancy in common. 3. By the whole at last descending to and vesting in one single person, which brings it to an estate in severalty (e). 638.

By parti-  
tion;  
by aliena-  
tion;

by union.

Partition by  
private  
agreement.

There are four sorts of partitions by private agreement. 1. Where coparceners mutually agree as to their respective shares (f). If coparceners of full age and unmarried, and of sane mind, make such a partition of lands in fee simple, it is effectual for ever, though the values be unequal. But if it is of lands entailed, or if any of the parceners are of unsound mind, it will bind the parties themselves, but it will not bind their issues, unless it is equal. If any are covert, it will bind the husbands, but not the wives or their heirs. If any are within age, it will not bind the infants (g). 2. Where coparceners agree to choose some

(a) 2 Bl. Com. 187; 2 Cruise T. 19, § 2; Litt. s. 241.

(b) 2 Cruise T. 19, § 10.

(c) 6 Jarm. & Byth. by Sweet, 589; 4 Cruise T. 32, c. 6, § 22, 24; 2 Pres. Shep. T. 326—7; Co. Litt. 169 a; Watk. Conv. 3rd ed. by Prest. 77, 162.

(d) See *infra*, Part III. T. 12, Ch. 3, s. 4.

(e) 2 Bl. Com. 189, 191; 2 Cruise T. 19, § 11, 33.

(f) 2 Cruise T. 19, § 12; Litt. s. 243.

(g) 2 Cruise T. 19, § 13; Co. Litt. 166 a, 173 b; Litt. s. 255—8.



friend to divide the lands; in which case the eldest daughter shall choose first, and the other daughters according to their seniority (*a*). 3. Where the eldest makes the division of the lands; in which case she shall choose last; for, to avoid partiality, *cujus est divisio, alterius est electio* (*b*). 4. Where the lands are divided, and then the sisters draw lots for their shares (*c*). **639.**

Coparceners may also obtain partition of the estate by an application to the [Chancery Division of the High Court of Justice] or the County Court (*d*). **640.**

PART II.  
T. 7, CH. 2.

Partition  
by the  
Chancery  
Division or  
the County  
Court.

In consequence of the Statute of Frauds, 29 Car. 2, c. 3, no legal partition could be made between coparceners without deed. And by the stat. 7 & 8 Vict. c. 76, s. 3, and 8 & 9 Vict. c. 106, s. 3, a deed is necessary to the partition of freehold or leasehold hereditaments. But an agreement in writing to make a partition will have the same effect in equity as an actual partition at law (*e*). **641.**

Necessity  
for a deed  
of partition.

If two houses of unequal value descend to two coparceners, each upon a partition shall have a house; the one having the house of the highest value paying to the other and her heirs yearly a certain sum sufficient to make the partition equal in value, which sum is called a rent for owelty or equality of partition (*f*). **642.**

Rent for  
equality of  
partition.

Partition may be made so that each one may annually have the property for a particular time of the year; or so that each may have it for a year or a certain number of years alternately to them and their heirs; or so that each may have the possession of different parts of the property alternately to them and their heirs (*g*). **643.**

Special  
modes of  
partition.

(*a*) 2 Cruise T. 19, § 14; Litt. s. 244.

(*b*) 2 Cruise T. 19, § 16; Litt. s. 245; Co. Litt. 166 b.

(*c*) 2 Cruise T. 19, § 17; Litt. s. 246.

(*d*) Co. Litt. 169 a, n. (1), VII.;

Story's Eq. Jur. § 646, et seq.; 31 & 32 Vict. c. 40, s. 12.

(*e*) 2 Cruise T. 19, § 19.

(*f*) 2 Cruise T. 19, § 31, 32.

(*g*) 2 Cruise T. 19, § 18; Co. Litt. 165 a, 167 a, b.

PART II.  
T. 7, CH. 2.

In the case of estovers, or a common without limit as to number, or a piscary, or right of fishing without limit, the eldest shall have it, and the rest shall have an allowance out of the rest of the inheritance ; or, each shall enjoy it for a certain time ; or, in the case of a piscary, one shall have one fish or draught, and the other the second fish or draught (a). **644.**

Alienation.

If there are only two coparceners, and one of them aliens, the estate in coparcenary is determined. But if there are more than two, and one alien, the others may still hold in coparcenary, as between or among themselves (b). **645.**

(a) Co. Litt. 165 a.

(b) See Watk. Conv. 3rd ed. by Prest. 97.

## CHAPTER III.

## OF AN ESTATE IN COMMON.

AN estate in common, or a tenancy in common, is a joint undivided ownership of the same subject of property by two or more persons, created either by such a destruction of an estate in joint tenancy or coparcenary as does not sever the unity of possession, or by a limitation to such persons in a deed or will, expressly as tenants in common, or in terms which import a distinctness of interest in each (a). 646.

PART II.  
T. 7, Ch. 3.  
— — — — —  
Definition.

Where an estate is limited to two or more persons, it is sometimes difficult to determine whether a joint tenancy or a tenancy in common is created, especially where words of survivorship occur. The law, indeed, leans in favour of a tenancy in common rather than a joint tenancy ; but, in order to exclude all doubt, it is the most usual, as well as the safest way, when intending to create a tenancy in common, to negative a joint tenancy, as well as to express a tenancy in common ; as, to A. and B., to hold as tenants in common, and not as joint tenants (b). 647.

Uncertainty  
whether a  
tenancy in  
common or  
in joint  
tenancy is  
created.

Where, however, there are no words expressive of benefit of survivorship, and real or personal estate is devised or bequeathed to two or more persons, and there are any words indicating an intention that the devisees or legatees shall take several and distinct shares in it, they will be

General rule  
as to words  
creating a  
tenancy in  
common.

(a) See 2 Bl. Com. 191—3 ; 2 Cruise T. 20, § 3, 7 ; Litt. s. 298.

(b) 2 Bl. Com. 193, 194. See Watk. Conv. 3rd ed. by Prest. 80, 86—7 ; 6 Cruise T. 38, c. 15 ; 2 Jarm. Wills, 2nd ed. 205—216 ; 2

Rop. Leg. by White, c. 21 ; Moore v. Cleghorn, 10 Beav. 423 ; Haddeley v. Adams, 22 Beav. 266, 272—5 ; Byran v. Twigg, L. R. 3 Eq. 433 ; 3 Ch. Ap. 183 ; Ryres v. Ryres, L. R. 11 Eq. 539.

PART II.  
T. 7, CH. 3.

tenants in common (a). As where so much of a sum of money or residue is given to A., and so much to B., or to them "in equal shares," or "share and share alike"; or where a distinct "share" of either of the legatees is referred to; or where the legacy is given to two or more, "to be divided equally amongst them," or merely "to be divided amongst them, or to them jointly and equally," or "to and amongst them," or "to them respectively" (b). But where the devise or bequest to the co-devisees or legatees is only for life, and it appears that an ulterior devisee or legatee is not intended to take until the decease of the survivor of the co-devisees or co-legatees, they either take a joint tenancy with its incidental right of survivorship, or a tenancy in common, with an implied gift to the survivors and survivor for life (c). **648.**

No unity  
necessary,  
except  
unity of  
possession.

In this tenancy, the only unity which is essential is that of possession. There either may or may not be a unity of interest, title, and time. So that one tenant in common may hold his part in fee simple, and another in fee tail. One may take by descent from A. at one time, another by purchase from B. at a different time (d). And if a class of persons, as children, are to take as tenants in common, when one takes in esse, he may take the entirety; and when others are born, the estate will open and admit them to their shares. But if they are to take by way of remainder, they must be capable during the particular estate (e). **649.**

No entirety  
of interest.

Tenants in common have no entirety of interest, but take by distinct moieties, having distinct undivided freeholds in every part of the lands. Hence, 1. There is no

Conse-  
quences as

(a) 6 Cruise T. 38, c. 15, § 10; 2 Rop. Leg. by White, 1367; 2 Jarm. Wills, 2nd ed. 211.

(b) 2 Rop. Leg. by White, 1367; 2 Jarm. Wills, 2nd ed. 211; *Hodges v. Grant*, L. R. 4 Eq. 140; *Att.-*

*Gen. v. Fletcher*, L. R. 13 Eq. 128.

(c) 2 Jarm. Wills, 2nd ed. 213, 215; *Begley v. Cook*, 3 Drewry 662.

(d) 2 Bl. Com. 191, 192; 2 Cruise T. 20, § 2.

(e) 2 Pres. Shep. T. 235.

survivorship between them. 2. Under the old law, one of them could not transfer any part to the other without livery of seisin, or what was equivalent to it (*a*). So that they could not release to each other the immediate freehold of lands without previously creating an estate capable of enlargement by release, as by a bargain and sale for a year (*b*). But now, in consequence of the statutes 4 Vict. c. 21, s. 1, and 7 & 8 Vict. c. 76, s. 2, and 8 & 9 Vict. c. 106, s. 2, a release is sufficient without any prior lease, and, indeed, the immediate freehold will pass by a mere grant (*c*). **650.**

PART II.  
T. 7, CH. 3.

regards  
survivor-  
ship and  
alienation.

[It is enacted by stat. 45 & 46 Vict. c. 38, s. 19 (Appendix), that "where the settled land comprises an undivided share in land, or under the settlement, the settled land has come to be held in undivided shares, the tenant for life of an undivided share may join or concur, in any manner and to any extent necessary or proper for any purpose of this Act, with any person entitled to or having power or right of disposition of or over another undivided share." ] **650a.**

Tenant for  
life of an  
undivided  
share of  
land, under  
the Settled  
Land Act,  
1882.

Estates held in common are subject to dower and curtesy (*d*). **651.**

Curtesy and  
dower.

Estates in common can only be destroyed in two ways : 1. By uniting all the interests in one tenant, by purchase or otherwise, which brings the whole to one estate in severalty. 2. By making partition among the several tenants in common, which gives them estates in severalty (*e*). **652.**

Destruction  
of estates  
in common.

In consequence of the Statute of Frauds (29 Car. 2, c. 3), no legal partition could be made between tenants in common without a writing. And, by the stat. 7 & 8 Vict. c. 76,

Partition.

(*a*) 2 Bl. Com. 194; Co. Litt. 188 b; 6 Jarm. & Byth. by Sweet, 589; 2 Cruise T. 23, § 8; and 4 Cruise T. 32, c. 6, § 25.

(*b*) 6 Jarm. & Byth. by Sweet, 589; 4 Cruise T. 32, c. 6, § 25;

Watk. Conv. 3rd ed. by Prest. 86, 88.

(*c*) See *infra*, Part III. T. 12, Ch. 3, s. 3.

(*d*) 2 Cruise T. 20, § 21, 23.

(*e*) 2 Bl. Com. 194.

PART II.  
T. 7, CH. 3.

s. 3, and 8 & 9 Vict. c. 106, s. 3, a deed is necessary to the partition of freehold or leasehold hereditaments. But an agreement in writing to make partition will have the same effect in equity as an actual partition at law (*a*). **653.**

A tenant in common can compel a partition by an application to the [Chancery Division of the High Court of Justice] or to the County Court (*b*). [A tenant of his share by the curtesy, or a tenant for life of a share of land, even if such life estate be determinable on his marrying again is entitled to bring an action for sale or partition (*c*).] **654.**

(*a*) 2 Cruise T. 20, § 26; 6 Jarm. & Byth. by Sweet, 588; and see infra, Part III. T. 12, Ch. 2, s. 7.

(*b*) See Story's Eq. Jur. § 650—657; 31 & 32 Vict. c. 40, s. 12.

(*c*) *Hobson v. Sherwood*, 4 Reav. 184.

## TITLE VIII.

### OF LEGAL AND EQUITABLE INTERESTS.

INTERESTS may be, I. Merely Legal ; II. Merely Equitable ; III. Both Legal and Equitable. **655.**

PART II.  
TITLE VIII.

Division.  
Definitions.

I. A merely legal interest is such an interest in or ownership of real or personal property, as is not of a beneficial, but simply of a possessory and fiduciary character. **656.**

II. A merely equitable interest is a beneficial interest in or a beneficial ownership of real or personal property, unattended with the possessory and legal ownership thereof. **657.**

III. An interest both legal and equitable is an interest in or ownership of real or personal property, which confers a right both to the possession and to the beneficial enjoyment of such property, as well at law as in equity. **658.**

The possession spoken of here and in many other places, may be either personal or by substitute, as by one's termor for years, whose interest, though not connected in title with our own, is not inconsistent with it. Or it may be either actual, where the land is occupied by one's self or one's bailiff, or virtual, where it is occupied by one's tenant for years, or by a termor for years whose title is consistent with our own. Or it may be either executed, as where the land is occupied by one's self or one's bailiff, or executory, as in the case of a remainderman or reversioner during the continuance of the particular estate of freehold, or of the heir before entry (*a*). **659.**

Different  
kinds of  
possession.

(*a*) Smith's Executory Interests annexed to Fearn, § 49.

## CHAPTER I.

## OF LEGAL INTERESTS ; AND HEREIN OF USES.

PART II.  
T. 8, CH. 1.

How legal  
interests are  
created.

"Use" and  
"trust."

LEGAL interests, which we have already defined, may be created in various ways, of which we propose to treat in the Third Part of this work. One of these ways is by limitation of uses. **660.**

Originally, the terms use and trust were perfectly synonymous ; uses at common law being in most respects what trusts are now ; and the terms use and trust are both employed in the Statute of Uses to denote the same thing (*a*). But, in consequence of that statute operating so as to execute or convert some uses into legal interests, but not others, an essential distinction now exists between uses and trusts. Those which the statute executes, and sometimes also some of those uses which it does not execute, and which are in reality trusts, are still called uses ; while the term trusts is applied to those uses which the statute does not execute, and is never properly applied to those which the statute does execute. A use executed by the statute is a legal estate or interest. A use before the Statute of Uses was, and a trust, as distinguished from a use, now is, an equitable estate or interest. These distinctions will be more fully unfolded by the observations which follow in this and the next chapter. **661.**

Origin of  
uses and  
trusts.

At the common law, the beneficial ownership (that is, the right to the rents and profits, and the power of disposing of the estate) was inseparably annexed to the possession and legal seisin or ownership (*b*). But the ecclesiastics,

(*a*) 1 Cruise T. 12, c. 1, § 2 ; Co.      (*b*) See 1 Cruise T. 11, c. 1, § 1.  
Litt. 271 b, n. (1), II.



borrowing the idea of a use from the *fidei commissum* or trust of the Civil Law, in order to evade the old Statute of Mortmain, procured conveyances to be made to laymen, with a secret agreement that they should hold the lands for the use of ecclesiastics, and permit them to take the rents and profits (*a*). And the clerical Chancellors of those days compelled the feoffees to uses to execute them; John Waltham, Bishop of Salisbury and Chancellor to King Richard II., having invented the writ of *subpoena*, returnable only into Chancery, for the purpose of compelling a discovery of such uses, where they were declared in a secret manner (*b*). This gave the beneficial ownership a separate existence, apart from, and collateral to the possessory and legal ownership or *seisin*. But it was only in a Court of Equity that it was recognised as distinct from the possessory and legal ownership or *seisin* (*c*). The use was still no right, title, or interest at law; for the Courts of common law still regarded the feoffee to uses as clothed with the beneficial ownership, as well as with the possessory and legal ownership or *seisin* (*d*). **662.**

The invention of uses soon became productive of very great grievances. Feoffments to uses were usually made in a secret manner, so that where a person had cause to sue for land, he could not find out the legal tenant against whom he was to bring his *præcipe*. Husbands were deprived of their estates by the curtesy, and widows of their dower; creditors were defrauded; the king and the other feudal lords lost the profit of their tenure, their wardships, marriages, and reliefs; and a universal obscurity and confusion of titles prevailed, by which means purchasers for valuable consideration were frequently defeated (*e*). **663.**

PART II.  
T. 8, CH. 1.

Evils incident to uses before the statute.

(*a*) 1 Cruise T. 11, c. 1, § 4, 5.

(*b*) 1 Cruise T. 11, c. 1, § 12, 13.

(*c*) See 1 Cruise T. 11, c. 2, § 2.

(*d*) See 1 Cruise T. 11, c. 2, § 1, 4, 5, 7.

(*e*) 1 Cruise T. 11, c. 2, § 40.

PART II.  
T. 8, CH. 1.  
Remedies.

Statute of  
Uses.

As a remedy for these grievances, several statutes were made, to subject uses to the same rules as legal estates (*a*). But means having been found of evading these statutes (*b*), it was enacted by the stat. 27 Hen. 8, c. 10, called the Statute of Uses, "that, where any person or persons stand or be seised, or at any time hereafter shall happen to be seised, of and in any honours, castles, manors, lands, tenements, rents, services, reversions, remainders, or other hereditaments, to the use, confidence, or trust of any other person or persons, or of any body politic, by reason of any bargain, sale, feoffment, fine, recovery, covenant, contract, agreement, will, or otherwise, by any manner or means, whatever it be; in every such case all and every such person and persons, and bodies politic, that have or hereafter shall have any such use, confidence, or trust, in fee simple, fee tail, for term of life or for years, or otherwise, or any use, confidence, or trust, in remainder or reversion, shall from henceforth stand and be seised, deemed and adjudged in lawful seisin, estate, and possession of and in the same honours, castles, etc., to all intents, constructions, and purposes in the law, of and in such like estates as they had or shall have in use, trust, or confidence of or in the same; and that the estate, title, right, and possession that was in such person or persons, that were or hereafter shall be seised of any lands, tenements, or hereditaments, to the use, confidence, or trust of any such person or persons, or of any body politic, be from henceforth clearly deemed and adjudged to be in him or them that have or hereafter shall have such use, confidence, or trust, after such quality, manner, form, and condition, as they had before, in or to the use, confidence, or trust that was in them. And that where divers and many persons be or hereafter shall happen to be jointly seised of and in any lands, tenements, rents,

(*a*) 1 Cruise T. 11, c. 2, § 41; 2  
Bl. Com. 332.

(*b*) 1 Cruise T. 11, c. 3, § 1.

reversions, remainders, or other hereditaments, to the use, confidence, or trust of any of them that be so jointly seised; in every such case, those person or persons which have or hereafter shall have any such use, confidence, or trust in any such lands, etc., shall from henceforth have, and be deemed and adjudged to have, only to him or them that have or hereafter shall have any such use, confidence, or trust, such estate, possession, and seisin of and in the same lands, etc., in like nature, manner, form, condition, and course, as he or they had before in the use, confidence, or trust of the same lands, tenements, or hereditaments." PART II.  
T. 8, CH. 1.

**664.**

It is evident, from the words of this statute, that the intention of the Legislature was entirely to abolish uses, by destroying the estate of the feoffees to uses, and transferring it from them to the cestui que use, in such a way as to change the use into a legal estate. And the statute has so far answered the intention of the makers of it, that no use, upon which the statute operates, can exist in its former state for more than an instant, as the legal seisin and possession of the land must become united to it, immediately upon its creation; so that, where this statute operated, lands conveyed to uses could never, in future, become liable to the charges or incumbrances of the feoffees, but, on the other hand, would be always subject to the charges and incumbrances of the cestui que use, and to all the rules of the common law (a). **665.**

In the case of an assurance operating by transmutation of the possession (b), it is not necessary that the word use or trust should occur in order to raise a use for the statute to execute. And hence, when a man made a feoffment sub conditione, ea intentione that his wife should have the lands for her life, remainder to his youngest son in fee, and the feoffee died without making any estate, and the heir

Word use or trust not necessary where there is a transmutation of possession.

(a) 1 Cruise T. 11, c. 3, § 8, 4.

(b) See infra, Part III. T. 12, c. 2.

PART II.  
T. 8, CH. 1.

of the feoffier entered, it was resolved that there was not a condition, but a use which was executed presently according to the intent (a). 666.

Cases where  
"trusts"  
are the only  
uses.

Though a conveyance or devise be made to trustees upon certain "trusts," yet the statute will execute the so-called trusts, and convert them into legal estates, where the conveyance or devise is not to and to the use of the trustees, but the "trusts" constitute in fact the first and only uses (b). 667.

Operation of  
the Statute  
of Uses.

The operation of the Statute of Uses is to execute the use, that is, to convey the possessory and legal estate, seisin, or ownership from the person who is seised to the use, to the person in whose favour the use was created, who is called the *cestui que use*, and to transmute such use, whether such use is in præsent, vested remainder, or reversion, and whether created by express words or by implication of law, into a possessory and legal estate, seisin, or ownership, either with or without the equitable and beneficial ownership, as the case may be, by the mere force of the statute, without entry or claim, or any other act of the parties. 668.

As already observed, the framers of the statute intended to abolish uses and trusts, as equitable and beneficial interests, separate from the possessory and legal estate, seisin, or ownership. It was intended to convert all uses of freehold hereditaments into estates, both legal and equitable, that is, into estates which confer a right both to the possession and to the beneficial enjoyment, as well at law as in equity. But there are many uses (as we shall see in the next chapter) which the statute does not execute at all; and which, therefore, remain as uses before the statute, or, in other words, as trusts, in the sense of merely equitable

(a) 2 Pres. Shep. T. 514, 520, n. (24); *Gilbertson v. Richards*, 4 Hurl. & Norm. 277; 5 Hurl. & Norm. 435.

(b) *Lewin on Trusts*, 4th ed. 161; *Nash v. Ash*, 1 Hurl. & Colt. 160; *Baker v. White*, L.R. 20 Eq. 166.

interests. Thus, where a use is engrafted on a use (as where a conveyance is made to A., to the use of B., to the use of or in trust for C.), the statute only executes the first use, that is, the use limited to B., because there is no one seised, by the effect of the conveyance itself, independently of the statute, to the use of the person to whom the second use is limited, that is, C. And even as to those uses which the statute does execute, the intention of the framers of it is often only partially accomplished. For, where a further use in favour of some other person is engrafted on the use executed, as in the instance just given, there, as such further use or use upon a use is not executed by the statute, so neither is it at all affected by the statute, but it remains a trust, which confers the equitable and beneficial interest or ownership on the person to whom such further use is limited, so as to leave the person to whom the first use is limited only a possessory and legal estate, seisin, or ownership, instead of the legal and equitable interest conjoined and consolidated together, as intended by the framers of the Act (*a*). 669.

The statute executes uses which, in their origin, are contingent or future, whether limited by way of remainder or by way of executory limitation of another kind ; but it does not execute contingent uses, until they cease to be contingent, or even future uses which are not contingent, unless limited by way of remainder, until they cease to be future (*b*) ; for, until they so cease to be contingent or future, the words of the statute, "seisin, estate, and possession," have no proper application to them ; the seisin, estate, and possession of the person seised to such

(*a*) Compare 2 Bl. Com. 333 ; 1 Cruise T. 11, c. 3, § 4, 33, 34, 35 ; 2 Pres. Shep. T. 505, 517 ; Co. Litt. 271 b, n. (1), III., IV. And see *infra*, par. 684, et seq.

(*b*) 2 Pres. Shep. T. 505 ; 1 Cruise

T. 11, c. 3, § 33 ; Sugd. Introduction to Powers, p. xv. ; but see Preston's Remarks in 2 Pres. Shep. T. 505, 517 ; and in his ed. (the 3rd) of Watk. Conv. 123.

PART II.  
T. 8, CH. I.

uses cannot be annexed to such uses, since until that time they are necessarily collateral to the legal seisin, estate, and possession (a). 670.

Scintilla  
juris, in the  
case of  
future uses.

By the stat. 23 & 24 Vict. c. 38, s. 7, "where by any instrument any hereditaments have been or shall be limited to uses, all uses thereunder, whether expressed or implied by law, and whether immediate or future, or contingent or executory, or to be declared under any power therein contained, shall take effect, when and as they arise, by force of and by relation to the estate and seisin originally vested in the person seised to the uses; and the continued existence in him or elsewhere of any seisin to uses or scintilla juris shall not be deemed necessary for the support of or to give effect to future or contingent or executory uses; nor shall any such seisin to uses or scintilla juris be deemed to be suspended, or to remain or to subsist in him or elsewhere" (b). 671.

General  
rules as to  
seisin to  
serve uses.

No person can convey a use in land of which he is not seised in possession, remainder, or reversion, when the conveyance is made (c). And the seisin, which is to serve the use, or, in other words, the estate out of which the use is to arise, should be at least co-extensive with the use. If the use is greater in quantity than the estate out of which it is limited, it will cease upon the determination of that estate, but will be good in the meantime. So that, if lands are given to A. for his life, to the use of B. for his life, and A. dies, B.'s estate becomes determined. So, if a conveyance is made to A. [without words of limitation], to the use of B., his heirs and assigns, B.'s estate ceases on the death of A. (d). 672.

No use on a

A use cannot arise on a release by way of extinguish-

(a) See Smith's Executory Interests annexed to Fearn, § 47, 48, 52—55.

(b) On this subject, see 1 Sugd. Pw., 7th ed. c. 1, s. 3; 2 Cruise T.

16, c. 6, § 33, 34, 49—52.

(c) 1 Cruise T. 11, c. 3, § 20.

(d) 1 Cruise T. 11, c. 3, § 19; 3 Jarm. & Ryth. by Sweet, 219; 2 Pres. Shep. T. 524.

ment of right, for there is not any seisin or estate ; nor on a surrender of an estate of freehold, for the estate is extinct by the operation of the surrender (a). **673.**

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release of  
right or  
surrender.

A bargain and sale, under a common law authority, or under an authority given by an Act of Parliament, raises a seisin, on which uses may be limited which the Statute of Uses will execute ; and therefore the property may be conveyed to the ordinary limitations to prevent dower, including the power of appointment. But a bargain and sale which derives its effect from the Statute of Uses, or a covenant to stand seised, does not raise a seisin, but only transfers a use. And although the statute executes a use limited to the bargainee or covenantee, so that he becomes seised, yet if a use were limited to arise out of the seisin by the bargain and sale or covenant to stand seised, it would be a use upon a use, and consequently a mere trust (b). **674.**

Uses on a  
bargain and  
sale or  
covenant  
to stand  
seised.

All natural persons, having a legal estate of freehold may be seised to a use (c). But although mention is made in the statute of persons being seised to the use, etc. of bodies politic, nothing is said of bodies politic being seised to the use of others ; and therefore, if lands are given to a corporation for any use or upon any trust, the statute does not operate upon it (d). **675.**

Who may  
be seised to  
a use.

All natural persons and corporations who are capable of taking lands by any common law conveyance, may have a use limited to them (e). The cestui que use must in general be a different person from him who is seised to a use ; for the words of the statute are, " where any person or persons stand or be seised, etc., to the use, confidence,

Who may  
be cestuis  
quo use.

(a) 2 Pres. Shep. T. 507.

(b) 3 Jarm. & Byth. by Sweet, 238 ;

9 Id. 425—6 ; 1 Pres. Shep. T. 227 ;

4 Cruise T. 32, c. 10, § 34 ; Watk.

Conv. 3rd ed. by Prest. 203—4 ; *Nash*

v. *Ash*, 1 Hurl. & Colt. 160, 168.

(c) 1 Cruise T. 11, c. 3, § 19 ; 2  
Pres. Shep. T. 509.

(d) Burton, § 130 ; 1 Cruise T. 11,  
c. 3, § 10 ; Watk. Conv. 3rd ed. by  
Prest. 121, 259.

(e) 1 Cruise T. 11, c. 3, § 24.

PART II.  
T. 8, CH. I.

or trust of any other person or persons," etc. (a). And Lord Bacon says, "That where the party seised to the use and the cestui qui use is one person, he never taketh by the statute, except there be a direct impossibility or impertinency for the use to take effect by the common law" (b). Thus, if A. be enfeoffed to the use of himself and B., by a literal construction of the statute, B. would take his share of the estate by Act of Parliament, leaving A. to take his immediately by the feoffment ; but then they would, contrary to the intention, be tenants in common instead of joint tenants, because identity of title is essential to joint tenancy ; and therefore it has been decided, that they are both in by the statute (c). **676.**

Of what a  
use may be  
limited.

Not only corporeal hereditaments, but also incorporeal ones, such as advowsons, tithes, rents, etc., are within this statute (d). [And there could not] be a use of a thing which is not in esse, as a way, common, etc., which are newly created (e). **677.**

Stat. 44 & 45  
Vict. c. 41.  
The Con-  
veyancing  
and Law of  
Property  
Act, 1881.  
Grant of  
easements,  
etc., by way  
of use.

[But now with respect to conveyances made after the 31st of December, 1881, it is enacted by stat. 44 & 45 Vict. c. 41, s. 62 (Appendix), that "a conveyance of freehold land to the use that any person may have, for an estate or interest not exceeding in duration the estate conveyed in the land, any easement, right, liberty, or privilege in, or over, or with respect to that land, or any part thereof, shall operate to vest in possession in that person, that easement, right, liberty, or privilege for the estate or interest expressed to be limited to him ; and he, and the persons deriving title under him, shall have, use, and enjoy the same accordingly."] **677a.**

(a) 1 Cruise T. 12, c. 3, § 26 ; Co. Litt. 271 b, n. (1), VI. ; Watk. Conv. 3rd ed. by Prest. 124 ; *Peacock v. Eastland*, L. R. 10 Eq. 17 ; *Orme's Case*, L. R. 8 C. P. 281.

(b) 1 Cruise T. 11, c. 3, § 26 ;

Burton, § 157.

(c) Burton, § 159.

(d) 1 Cruise T. 11, c. 3, § 20.

(e) 4 Cruise T. 32, c. 9, § 16, 17 : 1 Pres. Shep. T. 222, n. (5).



Although the Statute of Wills, 32 Hen. 8, c. 1, was subsequent to the Statute of Uses, yet the Statute of Uses, being a remedial law, will execute uses limited by will (*a*). But an immediate devise to uses without a seisin to serve them, is good under the Statute of Wills, though it would be void if it depended on the Statute of Uses; as where a devise is made, not to a devisee to the use of A. for life, but immediately to the use of A. for life, with remainders over (*b*). **678.**

PART II.  
T. 8, CH. 1.  
Uses limited  
by will.

If a person conveys his land in fee, without any consideration or declaration of the uses or evidence of intent as to the uses of such conveyance, the uses result back to himself, and the statute immediately transfers the legal estate to such resulting use. And the same doctrine applies to any portion of the use which is not disposed of (*c*). **679.**

Resulting  
uses.

The doctrine of resulting uses only extends to those cases where an estate in fee simple passes. For, if a person conveys an estate to another in tail, without any rent reserved or any consideration whatever, whether good or valuable, real or nominal, and without any declaration of uses, no use will result to the donor, and consequently the donee will hold to his own use; because, by a gift of this kind, there is a tenure created between the donor and the donee in tail, which amounts to a consideration, and prevents the use from resulting (*d*). And for the same reason, if a person leases lands to another for life or for years, no use will result to the lessor. So, if a lessee for life or years grants over his estate without any declaration of use, the grantee will have it to his own use (*e*). In the

(*a*) 2 Pres. Shep. T. 508; Burton, § 281; 1 Cruise T. 12, c. 1, § 24; 3 Jarm. & Byth. by Sweet, 224; 1 Sugd. Pow. 171, 172. But see Co. Litt. 271 b, n. (1), VIII. 1.

(*b*) 3 Jarm. & Byth. by Sweet, 224—5; Co. Litt. 271 b, n. (1), VIII. 1.

(*c*) 1 Cruise T. 11, c. 4, § 19, 20, 40; 9 Jarm. & Byth. by Sweet, 83; 2 Pres. Shep. T. 501, 522; Co. Litt. 23 a.

(*d*) 1 Cruise T. 11, c. 4, § 50; 2 Pres. Shep. T. 513, 522.

(*e*) 1 Cruise T. 11, c. 4, § 51; 2 Pres. Shep. T. 513, 522, 525.

PART II.  
T. 8, CH. 1.

case of a conveyance of an estate for life or years without consideration, although a use be declared of part of the estate to the grantee, yet there will be no resulting use to the grantor (*a*). 680.

As a general rule, the use will result according to the estate which the parties have in the land ; so that, if they were joint tenants, the use will result to them in joint tenancy (*b*). Where, however, a tenant in tail suffered a recovery, if a use resulted to him, it was a resulting use in fee simple ; because it could not be supposed that he would go to the expense of suffering a recovery, if he were only to take back the same estate which he had before (*c*). 681.

As a devise imports a bounty, it follows, that it must be to the use of the devisee, if not otherwise declared, and that no use can in any case result to the heirs of the deviser, unless it appears by the will itself that the devise was not made to the use of the devisee. But if a person is merely named as a devisee to uses, and the use fails, there will be a resulting use to the heir of the deviser (*d*). 682.

Where a use is expressly limited to the owner of the estate, he will not be allowed to take any resulting use inconsistent with the use limited to him, unless the use limited is void or incapable of taking effect, as where it is too remote or uncertain (*e*). 683.

(*a*) 1 Cruise T. 11, c. 4, § 52.

Pres. Shep. T. 522.

(*b*) 1 Cruise T. 11, c. 4, § 30 ; 2  
Pres. Shep. T. 513, 522.

(*d*) 1 Cruise T. 11, c. 4, § 54.

(*c*) 1 Cruise T. 11, c. 4, § 58 : 2

(*e*) 1 Cruise T. 11, c. 4, § 45 : 2  
Pres. Shep. T. 522.

## CHAPTER II.

## OF EQUITABLE INTERESTS OR TRUSTS.

## SECTION I.

*Of Trusts Generally.*

AN equitable estate is a right in equity to take the rents and profits of lands, whereof the legal estate is vested in some other person, and to compel the person thus seised of the legal estate, who is called the trustee, to execute such conveyances of the land as the person entitled to the profits, who is called the cestui que trust, shall direct, and to defend the title of the land (*a*). But (as we shall see in the course of the following pages) there are other equitable interests or trusts, which, although of a different character, all come within the definition of an equitable interest in a preceding page, as being a beneficial interest in, or a beneficial ownership of, real or personal property, unattended with the possessory and legal ownership thereof. **684.**

Pr. II. T. 8,  
Ch. 2, s. 1.

Definition  
of an equita-  
ble estate.

Equitable  
interests  
or trusts  
other than  
equitable  
estates.

The word trust is sometimes used to denote the confidence reposed in the person who is the trustee (*b*); and, at other times, to denote the equitable interest or the right in equity of the person for whose benefit that confidence is reposed. And the term trust estate is sometimes used to import an estate held in trust; and, at other times, the beneficial interest in an estate so held in trust. **685.**

Meaning of  
the term  
"trust,"

and "trust  
estate."

(*a*) 2 Bl. Com. 328; 2 Cruise T. 11, c. 2, § 6, and T. 12, c. 1, § 3; 2 Pres. Shep. T. 501; 502.  
(*b*) See Lewin, 4th ed. 13.

Pr. II. T. 8,  
Ch. 2, s. 1.

Different  
kinds of  
trusts.

Trusts, in the sense of equitable interests, may be divided into public or charitable trusts, which are for the benefit of the public, or some considerable and definite portion of it; and private trusts, which are for the benefit of individuals or an individual (*a*). Again, trusts may also be divided into three kinds: express trusts, implied trusts, and constructive trusts; though the last two are frequently confounded, or, at least, classed together, and sometimes designated by the name of implied trusts, and sometimes by the name of constructive trusts (*b*). **686.**

## SECTION II.

### *Of Express Private Trusts.*

Pr. II. T. 8,  
Ch. 2, s. 2.

Definition of  
an express  
trust.

Trusts  
executed  
and execu-  
tory.

An express trust is a trust which is clearly expressed by the author thereof, or may fairly be collected from a written document (*c*). **687.**

Express trusts are either executed or executory. A trust executed is a trust which is formally and finally declared by the instrument creating it. A trust executory is a trust raised either by a stipulation or by a direction in express terms or by necessary implication, to make a settlement or assurance to uses or upon trusts which are indicated in, but do not appear to be formally and finally declared by the instrument containing such stipulation or direction (*d*). **688.**

Although an executory trust is necessarily directory, yet a trust may be directory and at the same time

(*a*) Lewin, 4th ed. 19.

(*b*) Smith's Manual of Equity, 113th ed. par. 226.

(*c*) Smith's Manual of Equity, 113th ed. par. 227.

(*d*) Smith's Executory Interests

annexed to Fearn, § 489: 2 Spence's Eq. Jur. 128, 129, 131, 132, 133; Watk. Conv. 3rd ed. by Prest. 132; *Turner v. Sargent*, 17 Beav. 203; *Cogan v. Duffield*, L. R. 2 Ch. D. (Ap.) 44.

executed, where it is finally declared in the instrument creating it (a). **689.**

Pr. II. T. 8,  
Ch. 2, s. 2.

Where uses are expressly and clearly limited which the Statute of Uses will not execute, that is, convert into legal estates, trusts are thereby created; for modern uses, unexecuted by the statute, are trusts, just as all uses were trusts before the statute was made (b). **690.** And

Express  
uses unexe-  
cuted are  
trusts.

1. As the words of the statute are, "where any person or persons shall be seised to the use, confidence, or trust of any other person or persons," etc. (and not where a use shall be limited to any person, to the use of or in trust for any other person), where uses are engrafted on uses, the statute only executes the first use. Hence where an estate is limited by a conveyance operating by transmutation of the possession, or, rather of the seisin, to A. and his heirs, to the use of B. and his heirs, to the use of or in trust for C. and his heirs, the statute executes the use to B. and his heirs, but the use to C. and his heirs is not executed by the statute, but is a trust (c). So a conveyance or devise to A. to the use of A., to the use of or in trust for B., or unto and to the use of A. to the use of or in trust for B., gives A. the legal estate, and B. an equitable estate only (d). And where lands are conveyed by covenant to stand seised, or by a bargain and sale operating under the Statute of Uses (as distinguished from a bargain and sale under a common law authority or an authority given by Act of Parliament), to A. and his heirs, to the use of B. and his heirs, the legal estate vests in A., and B. only takes a trust; because these conveyances do not operate by

What uses  
are not  
executed.

1. Uses on  
uses.

(a) *Doncaster v. Doncaster*, 3 K. & J. 26; *Fullerton v. Martin*, 1 Drew. & Smale 31; and see *infra*, par. 701—2.

(b) 1 Cruise T. 12, c. 1, § 2; 2 Pres. Shep. T. 502.

(c) See 2 Bl. Com. 335—6; 1

Cruise T. 12, c. 1, § 4, 10; 1 Spence's Eq. Jur. 490; 3 Jarm. & Byth. by Sweet, 219, 220; Watk. Conv. 3rd ed. by Prest. 125.

(d) 3 Jarm. & Byth. by Sweet, 224; Watk. Conv. 3rd ed. by Prest. 125—6.

Pr. II. T. 8,  
Ch. 2, s. 2.

directly transferring the possession, or rather the seisin, to the covenantee or bargainee, but only raise a use in his favour, which the statute executes : and therefore any use declared upon such a conveyance is a use upon a use, which the statute does not execute (*a*). 691.

Again, where lands are appointed to A. and his heirs to the use of B. and his heirs, the legal estate vests in A. and his heirs, and B. and his heirs take only a trust. For the appointment to A. and his heirs is not like a conveyance operating by transfer of the seisin to A. and his heirs ; as in the case of a grant or release to A. and his heirs. The appointment to A. and his heirs, is not like an original independent conveyance to A. and his heirs. A. and his heirs take under the deed creating the power of appointment ; and the appointment to A. and his heirs is only a specifying of the uses by the donee of the power. The estate, therefore, limited to A. and his heirs by the appointment, is in fact the first use of the deed creating the power, and the use limited by the appointment to B. and his heirs is in fact a use engrafted on the first use to A. and his heirs ; and therefore the use so engrafted is only a trust (*b*). This is the reason why in exercising a power of appointment by the same deed by which a release or grant is made, if it is intended (as it usually is) to create a legal estate, while the release or grant is made to the releasee or grantee to the uses thereafter expressed in favour of the persons intended to take the legal estate, the appointment is made by a distinct and previous operative part, not to the releasee or grantee to those uses, but directly to those uses themselves. If the grant, release, and appointment were made by one and the same operative part,

(*a*) See 1 Cruise T. 12, c. 1, § 9 ;  
4 Cruise T. 32, c. 10, § 34, and c. 9.  
§ 2, 3 ; 1 Pres. Shep. T. 227 ; 2  
Pres. Shep. T. 507, 509 ; 3 Jarm. &

Byth. by Sweet, 222, 238 ; Watk.  
Conv. 3rd ed. by Prest. 128.

(*b*) 1 Cruise T. 12, c. 1, § 9 ; Watk.  
Conv. 3rd ed. by Prest. 128.

the instrument so far as it operated as an appointment, would only create equitable estates in favour of the persons to whom the uses were limited. Again, in creating a power of appointment, where it is intended to confer the power of creating a legal estate by an appointment, and not a mere equitable estate, the land should be conveyed to the releasee or grantee to such uses as shall be appointed, and not to and to the use of the releasee or grantee to such uses as shall be appointed. If the land were conveyed to and to the use of the releasee or grantee to such uses as should be appointed, the uses to be appointed, being merely specifications of the uses of the release or grant, and taking effect under that instrument, would be uses upon uses, and therefore only trusts (a). 692.

2. Where an estate is devised to one for the benefit of another, the Courts will execute the use in the first or second devisee, as may appear best to effectuate the intention of the testator (b). The statute does not execute uses or trusts, where the consequence would be that the legal estate would be taken from a trustee, and yet it is requisite that he should continue to hold the estate, in order to perform the trusts (c). And hence, where a devise is made to a person in trust to pay over the rents and profits to another, the former takes the legal estate. But where a devise is made to a person in trust to permit another to receive the rents and profits, the latter takes the legal estate (d); unless it is on some other account necessary that the former should have the legal estate, in order to do any legal act which he is required to do (e).

2. Uses which could not be executed consistently with the intention.

(a) See 1 Sugd. Pow., 7th ed. 175.

(b) 1 Cruise T. 12, c. 1, § 24; 3 Jarm. and Byth. by Sweet, 225; Co. Litt. 271 b, n. (1), VIII. 1; *Baker v. White*, L. R. 20 Eq. 166.

(c) 1 Spence's Eq. Jur. 466; 2 Story's Eq. Jur. § 970; Co. Litt. 290

b, n. (1), VIII.; 2 Jarm. Wills, 2nd ed. 239, 240; *Fenwick v. Potts*, 8 D. M. & G. 506.

(d) 1 Cruise T. 12, c. 1, § 13; Co. Litt. 290 b, n. (1), VIII.; 2 Jarm. Wills, 2nd ed. 241, 242.

(e) 1 Cruise T. 12, c. 1, § 24.

Pr. II. T. 8,  
Ch. 2, s. 2.

And where an estate is devised to trustees for the separate use of a woman, the Courts, the better to effectuate the testator's intentions, will, if possible, construe the devise so as to vest the legal estate in the trustees (a). Where lands are devised to trustees, in trust to sell or mortgage them, in order to raise money for payment of debts, and subject thereto, in trust for a third person, or where executors to whom the real and personal estate are devised and bequeathed in trust are directed to pay debts, the trustees will take the legal estate ; for otherwise it would not be in their power to execute the trust. But where lands are devised to trustees, charged with the payment of debts, upon trust for a third person, the trustees will not take the legal estate (b). 693.

3. Uses of  
chattels.

3. The statute does not extend to uses or trusts of chattels real or personal ; for the words of the statute are "where any person is *seised* to the use," etc., and the word "seised" is inapplicable to personal estate (c). But we must distinguish between a use of a term for years, and a use of land for a term of years created *de novo*. The use of a term is not executed by the statute, because no one can be seised of a term. But the use of land for a term created for the first time by the instrument limiting such use, will be executed by the statute ; because a person may be seised of the land, and it matters not whether he is so seised to the use of another for a term or for any higher estate ; indeed the estate expressly mentions and executes uses for years (d). So that, if a term of years is assigned to A. to the use of B., he takes only a trust. But if a person, being seised in fee, grants to A. to the use of B.

(a) 1 Cruise T. 12, c. 1, § 15 : 2 Jarm. Wills, 2nd ed. 243.

(b) 1 Cruise T. 12, c. 1, § 20, 31 ; 2 Jarm. Wills, 2nd ed. 243—4 ; *Spence v. Spence*, 12 C. B. (N. S.). 199.

(c) 2 Bl. Com. 336 ; 1 Spence's Eq. Jur. 466 ; 2 Story's Eq. Jur. § 970 ; 1 Cruise T. 12, c. 1, § 34 : 2 Pres. Shep. T. 527.

(d) Watk. Conv. 3rd ed. by Prest. 122—3.



for a term of years, the statute executes this use in B., and he takes the legal estate in such term (a). **694.**

Pr. II. T. 8,  
Ch. 2, s. 2.

4. Copyhold estates are not within the Statute of Uses; because a transmutation of possession by the sole operation of the statute, without the concurrence or permission of the lord, would be an infringement of his rights, and would tend to his prejudice (b). **695.**

4. Uses of  
copyholds.

No particular form of expression is necessary to the creation of a trust (c). And a trust may be created although there may be an absence of any expressions in terms importing confidence (d). **696.**

What words  
will create  
a trust.

There are many cases arising under wills in which it is very difficult to determine whether or not a trust was intended to be created. It may, however, be laid down as a general rule, that expressions of recommendation, confidence, hope, wish, and desire are considered to create trusts, if the object and the property which is to form the subject of the supposed trusts are certain and definite, and if, regard being had to the whole context and circumstances of the will, the subject-matter, the previous conduct of the testator, the situation of the parties, and the probable intent, the expressions appear to have been intended to be imperative; and expressions showing a desire that an object should be accomplished will be deemed imperative, unless there are plain express words or there is a necessary implication that the testator did not mean to exclude a discretion to accomplish the object or not, as the person to whom the property is given may think fit. But if either the object or the subject is not definite; or if a discretion and a choice to act or not is given; or if the prior disposition of the pro-

(a) 2 Pres. Shep. T. 506—7; 3 Jarm. & Byth. by Sweet, 236; Co. Litt. 271 b, n. (1), VIII. 3.

(b) 1 Cruise T. 11, c. 3, § 22; 1 Cruise T. 12, c. 1, § 66; 1 Spence's Eq. Jur. 466; 2 Pres. Shep. T. 505,

n. (7), 507, 527; Co. Litt. 271 b, n. (1), VIII. 2; Watk. Conv. 3rd ed. by Prest. 123.

(c) 1 Spence's Eq. Jur. 498; 2 Spence's Eq. Jur. 20.

(d) *Page v. Carr*, 10 Hare 169.

PT. II. T. 8,  
CH. 2, s. 2.

perty imports an absolute ownership, as where it is given without any fetter in a former part of the will ; or if the motive assigned is beneficial to the donee ; or if the words which contemplate a benefit to a third person appear to be expressive of the motive by which the testator was actuated, rather than of a trust in favour of such person ; as where a legacy is given to A., the better to enable him to maintain his children ; or where a testator bequeaths a sum to trustees upon trust to pay the income to a person for life, "nevertheless to be by him applied towards the maintenance, education, or benefit of his children," which are legal obligations on a father [and now, partly, as to maintenance, on a mother with separate property] ; no valid trust will be created by words of this character (a). And any words by which it is expressed, or from which it may be implied, that the first taker may apply any part of the subject to his own use, are held to prevent the subject of the gift from being considered certain ; and a vague description of the object, that is, a description by which the giver neither clearly defines the object himself, nor names a distinct class out of which the first taker is to select, or which leaves it doubtful what interest is to be taken, will prevent the object from being certain within

(a) Story's Eq. Jur. § 1069, 1070. and notes ; 2 Spence's Eq. Jur. 64—71 ; 6 Cruise T. 38, c. 10. § 7 et seq. ; 1 Jarm. Wills, 2nd ed. 317 : *Briggs v. Penny*, 3 Mac. & G. 546 ; 2 Rep. Leg. by White, 1417, 1446 ; *Thorp v. Owen*, 2 Hare 607 ; *Macnab v. Whitbread*, 17 Beav. 299 ; *Reeves v. Baker*, 18 Beav. 372 ; *Castle v. Castle*, 1 D. & J. 352 ; *Gully v. Cregoe*, 24 Beav. 185 ; *Byne v. Blackburn*, 26 Beav. 41 ; *Wheeler v. Smith*, 1 Gif. 300 ; *Bonser v. Kinnear*, 2 Gif. 195 ; *Quaile v. Davidson*, 12 Moo. P. C. 268 ; *Fox v. Fox*, 27

Beav. 301 ; *Shorclton v. Shorclton*, 32 Beav. 143 ; *Hart v. Tribe*, 32 Beav. 279 ; 1 D. J. & Sm. 418 ; *Barrs v. Fawkes*, 2 Hem. & Mil. 60 ; *Bibby v. Thompson* (No. 1), 32 Beav. 646 ; *Hood v. Oglander*, 34 Beav. 513 ; *Eaton v. Watts*, L. R. 4 Eq. 151 ; *Lambe v. Eames*, L. R. 10 Eq. 267 ; 6 Ch. Ap. 597 ; *McCormick v. Grogan*, L. R. 4 H. L. 82 ; *Mackett v. Mackett*, L. R. 14 Eq. 49 ; *Curnick v. Tucker*, L. R. 17 Eq. 320 ; *Le Marchant v. Le Marchant*, L. R. 18 Eq. 414 ; *Stead v. Mellor*, L. R. 5 Ch. D. 225.

the meaning of the rule (a). But where in terms or in effect a gift is made to a parent for or towards the support of himself and children, the mere fact that the parent may apply part of the property for his own support, does not render the subject uncertain so as to prevent the disposition from being construed to create a trust in favour of his children: it is only an uncertainty which the Court can remove by ascertaining, if necessary, what should be devoted to the children (b). Again, the family of A. will often be a sufficient designation of the objects; for the context may render it definite, and show that it means his heir at law or heir apparent, or, in other cases, his children or descendants, or, in others, his brothers and sisters, or next of kin, according to the Statutes of Distribution. Generally speaking, neither the husband nor the wife will be considered as included under the word "family." Although the term "relations" is still more indefinite, the Court has executed a trust in favour of relations by giving the property, where personal, to the next of kin, according to the Statutes of Distribution, but per capita (c). But where a testator devised his leasehold estates to his brother A. for ever, "hoping he would continue them in the family," this did not create a trust; for the words gave a choice, and the object was not definite (d). And where a testator bequeathed to his wife all the residue of his personal estate, "not doubting but that she will dispose of what shall be left at her death to his two grandchildren"; these words did not create a trust, because the property would be uncertain; for it might be just what she chose to leave (e). 697.

(a) Story's Eq. Jur. § 1070, note;  
2 Spence's Eq. Jur. 69, 72, 78;  
1 Jarm. Wills, 2nd ed. 319; *Green*  
*v. Marsden*, 1 Drewry 646; *Bre-*  
*ton v. Mockett*, L. R. 9 Ch. D. 95;  
*Parnall v. Parnall*, L. R. 9 Ch. D.  
96.

(b) 2 Spence's Eq. Jur. 463—465.  
(c) Story's Eq. Jur. § 1071; 2  
Spence's Eq. Jur. 73—76; 2 Jarm.  
Wills, 2nd ed. 73—9.  
(d) Story's Eq. Jur. § 1072; 2  
Spence's Eq. Jur. 75.  
(e) Story's Eq. Jur. § 1078.

Pr. II. T. 8.  
Ch. 2, s. 2.

Donee  
excluded  
from taking  
beneficially,  
if a trust  
was in-  
tended,  
though not  
valid.

But it sometimes happens, that, although no valid trust is created, yet it is clear that a trust was intended; and in such instances the person to whom the gift is made is as completely excluded from taking beneficially as if a valid trust were created. This is the case where the words are directly or indirectly imperative, but the objects are too indefinite, or are not pointed out at all, or not in such a way that the Court can take judicial notice of them (*a*). 698.

A valid trust may be created by words expressive of confidence that a devisee or legatee will carry out the testator's wishes verbally communicated to the devisee or legatee before the will was made (*b*). 699.

Trusts  
governed by  
same rule  
as legal  
estates.

Trusts in real property, which are exclusively cognizable in equity, are generally governed by the same rules as legal estate (*c*). 700. But,

Exceptions:  
1. As regards  
executory  
trusts.

1. The construction put upon trusts executory, in some cases, differs from that which prevails in regard to legal estates and trusts executed. The limitations by which equitable estates and interests are created by way of trust executed, are construed in the same manner as similar limitations of legal estates and interests would be construed in a Court of Law; so that, for example, what would create an estate tail in the one case, will create an estate of the same kind in the other case. But such a constructive assimilation does not always take place in regard to equitable estates and interests created by way of trust executory. For, in the case of trusts executory, there is often no substantial analogy forming a ground for such assimilation; because the words are not so much actual

(*a*) Story's Eq. Jur. § 979 a, b; 2 Rep. Leg. by White, 1438; 1 Jarm. Wills, 2nd ed. 315; *Briggs v. Penny*, 2 Mac. & G. 546; *Bernard v. Minshull*, 1 Johns. 276.

(*b*) *Irvine v. Sullivan*, L. R. 8

Eq. 673.

(*c*) 1 Spence's Eq. Jur. 492, 499. 500, 502. 875, 876, 878; 2 Pres. Shep. T. 507, n. (8); Co. Litt. 290 b, n. (1), XVI.

limitations, such as those by which legal estates and interests are created, as instructions or intimations as to the mode in which the author of the trust wishes the property to be settled by some future conveyance, settlement, or assurance referred to in the instrument creating the trust; and therefore to be construed according to the intent of the party, as presumable from the nature of the case, or from the other parts of the instrument, rather than according to what would be the strict operation of the words, supposing them to be actual limitations contained in a formal and final instrument (a). 701.

PR. II. T. 8,  
CH. 2, s. 2.

In the case of trusts executed, then, a Court of Equity puts the same construction on technical words as that which is put by a Court of Law on limitations of legal estates. But in the case of trusts executory, equity considers the apparent intent to be collected from the whole instrument, or, where the language is doubtful, the presumable intent, rather than the strict import of technical words (b). Thus, where the legal estate is limited to one for life, remainder to the heirs male of his body, he takes an estate tail male under the rule in *Shelley's case*. And where in a *will or voluntary deed* there is a mere direction to settle an estate on one for life, to be followed by a remainder to the heirs of his body, as there is nothing of an inchoate or executory nature in the instrument itself, and the words are formal and explicit, and there is nothing in the instrument to show or afford a presumption that the words were not intended to be used in their technical sense, the mere reference to a further instrument does not render the trust executory; and therefore the limitations, as

(a) As to these trusts, see Smith's Executory Interests annexed to Fearn, § 489—502, and § 601—637. *Turner v. Sargent*, 17 Beav. 515; *Cogan v. Duffield*, L. R. 2 Ch.

D. (Ap.) 44.

(b) See 2 Spence's Eq. Jur. 131—135; Watk. Conv. 3rd ed. by Prest. 132—3; *Sackville-West v. Viscount Holmesdale*, L. R. 4 H. L. 543.

Fr. II. T. 8.  
Ch. 2, s. 2.

regards the rule in *Shelley's case*, receive the same construction as similar words used in limiting legal estates. But if *articles* express that an estate is to be settled on the husband for life, with remainder to the heirs of his body, then the inchoate nature of the instrument, combined with the allusion to a further instrument, renders the trusts executory. And as the issue in this case are purchasers for valuable consideration, so equity will construe the articles as giving an estate for life only to the husband, with a remainder in tail to the children (*a*). 702.

2. As regards  
dower of  
equitable  
estates.

2. Before the late Dower Act, Courts of Equity held that equitable estates were not subject to dower; because, before the question was tried, it was the general opinion, that by the creation of a trust estate, dower was prevented from attaching; and it is a maxim, that *communis error facit jus*; and to have held that trust estates were subject to dower would have affected a large proportion of the estates in the kingdom (*b*). 703.

3. As regards  
the convey-  
ance of  
equitable  
estates.

3. An equitable estate, being incapable of livery of seisin and of every form of conveyance which operates by the Statute of Uses, a mere declaration of trust, if in writing signed by the party bound or his agent lawfully authorised, was held sufficient to transfer such equitable estates; except that a fine or recovery was required, where the same would have been necessary if the estate had been a legal estate (*c*). In practice, however, trust estates have been usually conveyed in the same manner as legal estates (*d*). Thus it was usual for the mortgagee of an equitable inheritance, on the satisfaction of the debt, to execute indentures of lease and release, professedly to re-convey the estate; and for the

(*a*) 2 Spence's Eq. Jur. 136.

(*b*) 1 Spence's Eq. Jur. 501; Co. Litt. 290 b, n. (1), XVI.

(*c*) See Story's Eq. Jur. § 974, 974 a, and notes, and § 975; 1

Spence's Eq. Jur. 497, 500, 506, 877; Co. Litt. 290 b, n. (1), XVI.

(*d*) 1 Spence's Eq. Jur. 506; 9 Jarm. & Ryth. by Sweet, 515.

mortgagee of an equitable term to execute a deed of surrender; though in both these instances the deeds operate merely as a discharge from the equitable lien or contract created by the mortgage, for which purpose a receipt in full for the mortgage money would be equally effective (a). 704.

Pr. II. T. 8.  
Ch. 2, s. 2.

4. Trusts are independent of the rules of the common law founded on tenure; so that a life interest in a trust estate was not forfeited on any alienation by the tenant for life, even by fine (b); nor is a trust estate liable to escheat to the lord in consequence of attainder or want of heirs of the cestui que trust (c). 705.

4. As regards  
rules  
founded on  
tenure.

Before the passing of the statute 39 & 40 Geo. 3, c. 98, a person might suspend the enjoyment of real and personal estate, and direct that the whole of the rents, profits, and produce thereof shall be accumulated, for as long a period as that during which it was allowable to suspend the vesting of the ownership or property of and in such real and personal estate (d). 706.

Trusts for  
accumula-  
tion.

The mischievous extent to which Mr. Thellusson availed himself of this power gave rise to the statute 39 & 40 Geo. 3, c. 98, called "The Thellusson Act" (e). 707.

Thellusson  
Act.

By sect. 1 of this Act it is enacted, "That no person or persons shall, after the passing of this Act, by any deed or deeds, surrender or surrenders, will, codicil, or otherwise howsoever, settle or dispose of any real or personal property, so, and in such manner that the rents, issues, profits, or produce thereof shall be wholly or partially accumulated, for any longer term than the life or lives of any such grantor or grantors, settler or settlers; or the term of

(a) 9 Jarm. & Byth. by Sweet, 515, n. (e).

(b) 1 Spence's Eq. Jur. 500, 505;

1 Cruise T. 12, c. 2, § 11.

(c) 2 Pres. Shep. T. 507, n. (8).

(d) Smith's Executory Interests annexed to Fearn, § 738 a.

(e) See Hargrave on the Thellusson Act; Chitty's Statutes, by Welsby and Beavan.

Pr. II. T. 8.  
Ch. 2, s. 2.

twenty-one years from the death of any such grantor, settler, devisor, or testator; or during the minority or respective minorities of any person or persons who shall be living or in ventre sa mère at the time of the death of such grantor, devisor, or testator; or during the minority or respective minorities only of any person or persons who, under the uses or trusts of the deed, surrender, will, or other assurances, directing such accumulations, would for the time being, if of full age, be entitled unto the rents, issues, and profits, or the interest, dividends, or annual produce so directed to be accumulated: and in every case where any accumulation shall be directed otherwise than as aforesaid, such direction shall be null and void, and the rents, issues, profits, and produce of such property so directed to be accumulated, shall, so long as the same shall be directed to be accumulated, contrary to the provisions of this Act, go to and be received by such person or persons as would have been entitled thereto if such accumulation had not been directed." 708.

By sect. 2, however, it is provided, "That nothing in this Act contained shall extend to any provision for payment of debts of any grantor, settler, or devisor, or other person or persons, or to any provisions for raising portions for any child or children of any grantor, settler or devisor, or any child or children of any person taking any interest under any such conveyance, settlement, or devise, or to any direction touching the produce of timber or wood upon any lands or tenements; but that all such provisions and directions shall and may be made and given as if this Act had not passed." 709.

Land settled  
or devised  
in trust for  
sale for the  
benefit of a  
person to be  
deemed  
settled land.

[Under stat. 45 & 46 Vict. c. 38, s. 63 (Appendix), any land, or any estate or interest in land, settled or devised in trust for sale for the benefit of a person, or two or more persons concurrently, for any limited period is deemed settled land.] 710.



## SECTION III.

*Of Implied Trusts.*

An implied trust is a trust founded in the unexpressed but presumable intention of a party. Thus, where a person buys freehold, copyhold, or leasehold land, and pays the purchase money for it, but takes the conveyance or assignment in his own name and that of another or others, or exclusively in the name of another or others, whether jointly or successively, the trust of the legal estate will result to the person who advanced the purchase money; for it is presumed that the real purchaser intended the purchase to be for his own benefit, and took it in the name of another or others merely to answer some collateral purpose. The same doctrine is applied to securities taken in the name of a third person (a). And proof of the payment of the purchase money by the real purchaser may be furnished either by the language of the deed itself, or by some memorandum or note of the nominal purchaser, or by his answer to a bill of discovery, or by papers left by him and discovered after his death (b). 711.

FR. II. T. 8,  
CH. 2, s. 3.

Definition of  
implied  
trusts.

Convey-  
ance, assign-  
ment, or  
security in  
another's  
name.

In like manner, there will be a resulting trust, where stock is purchased in the name of the purchaser and a stranger, or is transferred by the owner into the name of himself and a stranger. But if a man delivers money or transfers stock to another, even though he is a stranger, no implied trust will arise, unless upon evidence (c). 712.

Purchase or  
transfer of  
stock or  
delivery of  
money.

No resulting trust will be raised, where a contrary intention, un rebutted by other evidence or grounds of presumption, is indicated by the terms or the object and

Where a  
resulting  
trust is  
rebutted ;

(a) Story's Eq. Jur. § 1201, 1201 a ; 1 Spence's Eq. Jur. 511 ; 2 Spence's Eq. Jur. 201, 219 ; 1 Cruise T. 12, c. 1, § 41 ; Sugd. Concise View, 556 ; 1 Scriven on Copyh.

4th ed. by Stalman, 408.

(b) Story's Eq. Jur. § 1201, note ; 2 Spence's Eq. Jur. 202.

(c) 2 Spence's Eq. Jur. 219.

Pr. II. T. 8,  
Ch. 2, s. 3.

as in the  
case of a  
purchase,  
transfer, or  
security in  
the name of  
a wife or  
child,

purpose of the instrument creating the trust, or is established by written or parol evidence, or may be presumed from the relation between the parties. And hence, in general, there will be no resulting trust where a purchase or transfer is made or a security is taken by a husband or a father (either solely or jointly with his own name or that of a stranger) in the name of a wife or a legitimate child, or an illegitimate child, if treated as a child, who is unprovided for, or considered by the husband or father as unprovided for, or as insufficiently provided for, or by a grandfather in the name of his grandchild, who is unprovided for, or considered by the grandfather as unprovided for, or insufficiently provided for, where the father is not living, or by a widowed mother in the name of her child; because it will be presumed that it was intended as an advancement and provision, in discharge of a moral obligation, or as a token of affection; unless there are circumstances which furnish a strong presumption of a contrary intention; such as a contemporaneous declaration or act of the purchaser or transferor to manifest an intention that the other party should take as a trustee. A subsequent act or declaration by the former will not suffice to negative an advancement. Nor will possession or receipt of the rents by the person who advanced the money, where it may be fairly regarded as having been had as a trustee for the other party (*a*). But the presumption of advancement may be negated by the oath of the husband or father that no advancement was intended (*b*), or by his both receiving and applying the income in the same way as

(*a*) Story's Eq. Jur. § 1196 a, note, 1202—3; 1 Cruise T. 12, c. 1, § 44; *Dumper v. Dumper*, 3 Gif. 583; *Drew v. Martin*, 2 Hem. & Mil. 130; *Williams v. Williams*, 32 Beav. 370; *Tacker v. Burrow*, 2 Hem. & M. 515; *Sayre v. Hughes*, L. R. 5 Eq. 376; *Hepworth v. Hepworth*,

L. R. 11 Eq. 10; *Stock v. Mc.eroy*, L. R. 15 Eq. 55; *Batstone v. Salter*, L. R. 19 Eq. 250; 10 Ch. Ap. 431; *In re Eykyn's Trusts*, L. R. 6 Ch. D. 115. And see references in note (*d*), p. 311.

(*b*) *Devoy v. Devoy*, 3 Sm. & G. 403.

that of his general property (a), or by the surrounding circumstances (b). **713.**

Pr. II. T. 8,  
Ch. 2, s. 8.

There is no obligation on the part of a mother as on the part of a father to advance or make a provision for a child; and therefore when a widowed mother makes a purchase or investment in the name of the child, that does not of itself afford the presumption of advancement. In such a case the intention is a question of evidence; but very little evidence is sufficient to raise a case of advancement (c). **713a.**

In other cases, where the relationship is not such as to ground a presumption of advancement, the recognition of relationship and expressions of affection or regard ought to be looked to, in determining whether a beneficial gift was intended (d). **714.**

and other cases.

Where property is given upon trust, and the trusts fail, either entirely or partially, by reason of the failure of the intended objects or purposes, or some of them, or of the illegality or indefinite nature of the trusts or some of them, or otherwise; or where the trusts are fully and finally fulfilled, without exhausting all the property out of which they were to be fulfilled, there is a resulting trust of such property, or of so much thereof as remains unexhausted, to the person creating the trust, or to his heir or legal representatives, unless there is sufficient evidence or presumption of a contrary intention (e), or the trust is a charitable trust (f). **715.**

Where trusts fail, or the property is unexhausted by the trust.

(a) *Bone v. Pollard*, 24 Beav. 283.

(b) *Marshal v. Crutwell*, L. R. 20 Eq. 328.

(c) *Bennet v. Bennet*, L. R. 10 Ch. D. 474.

(d) 2 Spence's Eq. Jur. 214—219, 227, 228; *Fowkes v. Pascoe*, L. R. 10 Ch. Ap. 343; 1 Cruise T. 12, c. 1, § 72, 78, 80, 82; Sugd. Concise View, 557—559; Scriven on Copyh. 4th ed. by Stalman, 410—413; and

see *Jeans v. Cooke*, 24 Beav. 315, 521; *Beecher v. Major*, 2 Dr. & Sm. 431.

(e) Story's Eq. Jur. § 1196 a, 1200; 1 Spence's Eq. Jur. 510; 2 Spence's Eq. Jur. 22, 80, 243—246; 1 Cruise T. 12, c. 1, § 55, 56; 1 Jarm. Wills, 2nd ed. 475.

(f) 1 Jarm. Wills, 2nd ed. 482; infra, par. 734; *Att.-Gen. v. Greenhill*, 33 Beav. 193.

Pr. II. T. S.  
Ch. 2, s. 3.

But where there is an absolute, and, for anything that appears to the contrary, a beneficial gift, with an ineffectual or partial trust engrafted on it, the property or so much as is unexhausted by such partial trust, will remain in the donee (*a*). And where there is an absolute gift, with an illegal condition, the condition is void, and there is no resulting trust, but the donee may retain the whole; as where a testator bequeathed leasehold property upon condition that the legatee should assign a particular part to a charity (*b*). **716.**

A discretion as to the application of the property given may be so large, that the gift may amount to an absolute gift: as where there is an uncontrolled power to give away the property as and to whom the donee may think fit. But if the discretion is limited to certain general purposes, though they may be too indefinite to be enforced, the donee is a trustee (*c*). **717.**

Disposition  
without  
considera-  
tion, and  
without use  
or trust  
stated.

An implied resulting trust also arises where a conveyance, transfer, devise, or bequest of land or other property, without any consideration, express or implied, real or nominal, purports or is proved to have been made upon trust, but no distinct use or trust is stated (*d*). **718.**

Devise to  
an infant  
or married  
woman.

If a devise is to an infant or a married woman, the presumption is against the devise being upon trust; yet this presumption must yield to the fair construction of the will, if, according to that, the testator appears to have intended a trust (*e*). **719.**

There can be no resulting or implied trust between a lessor and his lessee, because every lessee is a purchaser by his contract and his covenants (*f*). **720.**

Limitation

The benefit of the surplus interest in a term or other

- |                                    |   |
|------------------------------------|---|
| (a) See 1 Spence's Eq. Jur. 510;   | 2 Spence's Eq. Jur. 57, 199, 225,         |
| 2 Spence's Eq. Jur. 23, 80.        | 226; 1 Cruise T. 12, c. 1, § 60;          |
| (b) 2 Spence's Eq. Jur. 229.       | <i>Briggs v. Penny</i> , 3 Mac. & G. 546. |
| (c) 2 Spence's Eq. Jur. 225.       | (c) 2 Spence's Eq. Jur. 225.              |
| (d) Story's Eq. Jur. § 1197, 1199; | (f) 1 Cruise T. 12, c. 1, § 85.           |

particular interest carved out of the inheritance for a particular purpose which does not exhaust the whole, will result, as personal estate, to the heir, as against the devisee; that is, where the devisee takes only what remains after the particular interest so given is carved out (a). **721.**

Pr. II. T. 8,  
Ch. 2, s. 3.  
of a par-  
ticular in-  
terest only.

A legacy to the heir or next of kin will not, of itself, preclude their claim to the surplus undisposed of. Nor will a bare intention to exclude, however expressed, though accompanied by words of anger or antipathy or even negative words, be sufficient to exclude the heir, in respect of the beneficial interest in real estate undisposed of, or the next of kin in respect of personalty; unless it be either specifically, or as part of a fund, actually and effectually, devised or bequeathed away to some one else, either directly or by the same kind of necessary implication as would in other cases be admitted to constitute an actual gift (b). **722.**

Exclusion  
of the heir  
or next of  
kin.

Where a person has covenanted to lay out money in the purchase of land, or to pay money to trustees to be laid out in the purchase of land, to be settled, if he afterwards purchases land to himself and his heirs, but does not settle it, the lands will be subject to the trusts upon which the land to be purchased was to be settled; for, unless the contrary clearly appears, it will be presumed that he purchased in fulfilment of his covenant, upon the principle that acts capable of being considered as done in fulfilment of an obligation shall be so construed (c). And where a trustee or agent is bound by a trust to lay out money in land, if he actually lays it out, the act will, if possible, be presumed to have been done in execution of the trust (d). **723.**

Covenant or  
trust to  
purchase  
lands.

(a) 2 Spence's Eq. Jur. 230.

Weber, 6 Hare 145, 152.

(b) 2 Spence's Eq. Jur. 232; 1 Jarm. Wills, 2nd ed. 278; *Johnson v. Johnson*, 4 Beav. 318; *Fitch v.*

(c) Story's Eq. Jur. § 1210; 2 Spence's Eq. Jur. 204—6.

(d) 2 Spence's Eq. Jur. 204—6.

## SECTION IV.

*Of Constructive Trusts.*

Pr. II. T. 8,  
Ch. 2, s. 4.

Definition  
of construc-  
tive trusts.

A constructive trust, as distinguished both from an express and from an implied trust, may be defined to be a trust which is raised by construction of equity, in order to satisfy the demands of justice, without reference to any presumable intention of the parties (*a*). **724.** Thus,—

Covenant  
or agree-  
ment to  
convey,  
transfer, or  
pay money  
or other  
property.

Where a person is under a covenant or agreement, for valuable consideration, to convey, transfer, or pay money or other property to or for the use or benefit of another, a constructive trust arises in favour of the latter against the former and his representatives, and those claiming under him as volunteers or with notice of the covenant or agreement; because, where things are covenanted or agreed to be done, equity treats them, for many purposes, as if they were done (*b*). **725.**

Fraudulent  
conveyance.

Where any fraud is committed in obtaining a conveyance of real property, the grantee in such case will be considered in equity as a constructive trustee for the person who has been defrauded (*c*). **726.**

Renewal of  
lease by a  
person  
having a  
limited  
interest.

If a mortgagee, or a person having a limited interest in leasehold property under a settlement by deed or will, renews the term on his own account, he will be held to be a trustee for all the persons interested in the old lease (*d*). **727.**

Stat. 45 & 46  
Vict. c. 38.  
The Settled  
Land Act,  
1882.  
Tenant for  
life trustee

[In consequence of the provisions of stat. 45 & 46 Vict. c. 38, s. 53 (Appendix), a tenant for life of settled land, or other limited owner, having, by virtue of that Act, the powers of a tenant for life, is, in relation to the

(*a*) See Story's Eq. Jur. § 1195,  
1254; 1 Spence's Eq. Jur. 509.

(*b*) See Story's Eq. Jur. § 1212,  
1231.

(*c*) 1 Cruise T. 12, c. 1, § 65.

(*d*) 1 Spence's Eq. Jur. 512; 2  
Spence's Eq. Jur. 299, 302, 303; 1  
Cruise T. 12, c. 1, § 63; 1 Rep. Leg.  
by White, 317; Co. Litt. 290 b, n.  
(1), XI.

exercise of any power given him by the Act, deemed to be in the position, and to have the duties and liabilities of a trustee for all parties entitled under the settlement (a).] **727a.**

Pr. II. T. 8,  
Ch. 2, s. 4.

for all  
parties  
entitled  
under the  
settlement.

## SECTION V.

### *Of Charitable Trusts.*

#### *I. Charitable Trusts generally (b).*

Charities are so highly favoured in the law, that they have received a more liberal construction than the law will allow to gifts to individuals (c). **728.** Thus,—

Pr. II. T. 8,  
Ch. 2, s. 5.

Charities  
favoured—

1. In regard to the want of proper trustees, if a testator makes a bequest for charity to such persons as he shall afterwards name executors, or to such persons as his executors shall name, and he appoints no executors, or the executors die in the lifetime of the testator, and no others are appointed; or if in other cases the trustees of a charitable legacy all die in the testator's lifetime; or if a corporation intrusted with a charity fails; [the Chancery Division of the High Court of Justice] will execute the charity (d). So, if a legacy is given to persons who have no legal corporate capacity to enable them to take as a corporation; as where a legacy is given to churchwardens for a charitable purpose. And so if a corporation for whose use a charity is designed is not in esse, and cannot come into existence but by some future act of the Crown (e). **729.**

in regard to  
the want of  
trustees;

2. The Court will supply all defects in conveyances, where the vendor is capable of conveying, and has a dis-

in regard to  
defects in  
conveyances;

(a) See supra, para. 448 l, 448 m.

(b) Various statutes have been passed on the subject of charities; as to which, see Chitty's Statutes, 4th ed.

(c) Story's Eq. Jur. § 1165; 2

Spence's Eq. Jur. 246, 247.

(d) Story's Eq. Jur. § 1165, 1166, 1177; 2 Rep. Leg. by White, 1186, 1190, 1192.

(e) Story's Eq. Jur. § 1169, 1170.

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in regard to  
the objects;

possible estate, and the mode of conveyance does not contravene the provisions of any statute (*a*). **730.**

3. In regard to the objects, it matters not how uncertain the persons or objects may be. For if a bequest is made in the most general and indefinite manner simply for charitable uses, or for religious and charitable purposes *eo nomine* (a religious purpose being deemed a charitable purpose), the Court will treat it as a valid charitable bequest, and will dispose of it for such charitable purposes as it shall think fit (*b*). Hence, if a man devises a sum of money to such charitable uses as he shall direct by a codicil annexed to his will or by a note in writing, and he leaves no direction by note or codicil, the Court will dispose of it to such charitable purposes as it shall think fit (*c*). But where the bequest may, in conformity to the express words of the will, be disposed of in charity of a discretionary, private nature, or be employed for any general benevolent or useful purposes, or for any general purpose, whether charitable or otherwise, or for charitable or other general purposes, or for benevolent, religious, and charitable purposes, at discretion, the bequest will be void, as being too general and indefinite for the Court to execute, and the property will go to the next of kin (*d*). **731.**

In order to constitute a valid charitable bequest in general terms, it must either be expressly and simply for charitable or religious purposes, or it must be made in such a way that there is no option given to apply it to any other than one of those purposes which are denominated

(*a*) Story's Eq. Jur. § 1171.

(*b*) Story's Eq. Jur. § 1167; 2 Rop. Leg. by White, 1186, 1198; *Baker v. Sutton*, 1 Keen 224; Tudor's Charitable Trusts, 2nd ed. 210, 212—216, 223, 229—233; *Wilkinson v. Lindgren*, L. R. 5 Ch. Ap. 570; *In re Kilvert's Trusts*, L. R. 12 Eq. 183; 7 Ch. Ap. 170.

(*c*) Story's Eq. Jur. § 1167; 2 Rop.

Leg. by White, 1186, 1190, 1198.

(*d*) See Story's Eq. Jur. § 1157, 1158, 1164, note 4 to ed. 6, 1167, 1169, 1183; 1 Jarm. Wills, 2nd ed. 175—8; *Thomson v. Shakespear*, 1 D. F. & J. 399; *In re Jarman's Estate, Leavers v. Clayton*, L. R. 8 Ch. D. 584.



charitable in the stat. 43 Eliz. c. 4, or one of such purposes as the Court construes to be charitable by analogy to those mentioned in that statute (a). The charitable purposes enumerated in the preamble of that statute are these: "The relief of aged, impotent, and poor people;—the maintenance of sick and maimed soldiers and mariners, schools of learning, free schools, and scholars in universities;—the repair of bridges, ports, havens, causeways, churches, sea-banks, and highways;—the education and preferment of orphans;—the relief, stock, or maintenance for houses of correction;—the marriages of poor maids;—the supportation, aid, and help of young tradesmen, handicraftsmen, and persons decayed;—the relief or redemption of prisoners or captives; and the aid or ease of any poor inhabitants concerning payments of fifteens, setting out of soldiers, and other taxes." Hence, a bequest to be applied in "assisting indigent but deserving individuals, or encouraging undertakings of general utility," is void, on account of the option to apply it to other purposes, which, though they may be benevolent, are not such as are deemed charitable, or regarded by the Court as within the technical description of charitable purposes (b). But a bequest for such charities and other public purposes as lawfully might be, in the parish of, etc., is a good charitable bequest; as it must mean public purposes for the benefit of that parish, and therefore would refer to charities within the meaning of the statute of Elizabeth (c). And a gift to trustees to apply, in such manner as they in their uncontrolled discretion should think proper, "for the benefit, advancement, and propagation of education, and learning in every part of the world, as far as circumstances

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(a) Story's Eq. Jur. 1155; see *University of London v. Yarrow*, 23 Beav. 159; 1 D. & J. 72, 79; *Thomson v. Shakespear*, 1 Johns. 612.

(b) *Kendall v. Granger*, 5 Beav. 300.

(c) *Dolan v. Macdermot*, L. R. 5 Eq. 60; 3 Ch. Ap. 676.

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Ch. 2, s. 5. will permit," is a good charitable bequest (a). And legacies to the Royal Society and the Royal Geographical Society are charitable bequests (b). And a bequest to the Queen's Chancellor of the Exchequer for the time being to be by him appropriated to the benefit and advantage of Great Britain, is a valid charitable bequest, so far as it relates to pure personalty (c). And a legacy for Roman Catholic schools for the purpose of promoting the Roman Catholic religion is good under the stat. 2 & 3 Will. 4, c. 115 (d). But a legacy to priests and chapels for the benefit of prayers for the repose of the soul of the testator is void by the policy of the law (e). 732.

A bequest is not a charitable bequest, and therefore within the operation of the Mortmain Act, because it is intended for "poor" persons, and the motive was charity. It is not a charitable bequest, unless it is a gift for the maintenance of a charity. And therefore, a bequest to "ten poor clergymen to be chosen by A." is not a charitable bequest, any more than a bequest to "A., B., & C., who are poor" (f). 733.

Where the party has specified any particular charitable object, which is contrary to the policy of the law, or, from some other reason, cannot be accomplished at all, or not in the way prescribed, the Court will devote the property to some other charitable purpose, if the nature of the gift, or the concurrence of other charitable gifts in the same instru-

(a) *Whicker v. Hume*, 14 Beav. 509; 1 D. M. & G. 506; 7 H. L. Cas. 124.

(b) *Beaumont v. Oliveira*, L. R. 6 Eq. 534; 4 Ch. Ap. 309.

(c) *Nightingale v. Goulburn*, 5 Hare 484; 2 Phil. 594.

(d) 1 Jarm. Wills, 2nd ed. 172—3; *West v. Shuttlesworth*, 2 My. & K. 684; *Bradshaw v. Tasker*, 2 My. & K. 221.

(e) 1 Jarm. Wills, 2nd ed. 170—3. As to superstitious uses and trusts, see Boyle on Charities, 242 et seq., and see also 1 Jarm. Wills, 2nd ed. 170—3. *West v. Shuttlesworth*, 2 My. & K. 684; *Heath v. Chapman*, 2 Drew. 417; *In re Blundell's Trusts*, 30 Beav. 360.

(f) *Thomas v. Howell*, L. R. 18 Eq. 198, 209.

ment, indicates that although the specified object was the favourite, yet it was not the exclusive object of the giver, but that he would have substituted some other charitable object, had he imagined that his favourite design might possibly be incapable of being accomplished. This is called the *cy près* doctrine. And when the residue is given to charity, that will not oblige the Court to devote the particular gift which fails to the objects of the residuary gift (*a*). But where no such indication appears (as where the testator's object is to build a church at W., and that cannot be effected), the next of kin will take (*b*). Where there are no objects in esse, but some may arise, the Court will keep the fund for them. And when there can be no such objects as those which are specified, or when the specified objects cease to exist, the Court will remodel the charity (*c*). **734.**

4. In regard to the surplus income, if a testator clearly shows an intention to devote the whole income of a property to charitable purposes, it will be so applied, although his specific charitable dispositions do not exhaust the whole income (*d*). And when the increased revenues of a charity are more than sufficient for the specified objects of charity, the surplus will not go to the heir-at-law or next of kin of the founder, but will be applied to the augmentation of the benefits of the charity, or to other charitable purposes (*e*). **735.**

in regard to  
surplus  
income :

(a) *Mayor of Lyons v. Advocate-General of Bengal*, L.R. 1 App. Cas. 92.

(b) See Story's Eq. Jur. § 1167—1169, 1172, 1176, 1181, 1182; 2 Rop. Leg. by White, 1204, 1221; *Russell v. Kellett*, 3 Sm. & G. 264; *Sinnett v. Herbert*, L.R. 12 Eq. 201; reversed, L.R. 7 Ch. Ap. 232.

(c) Story's Eq. Jur. § 1169, 1170, 1170 a, 1176; 2 Spence's Eq. Jur. 79.

(d) 2 Spence's Eq. Jur. 248; 2 Rop. Leg. by White, 1223; *Att.-*

*Gen. v. Corp. of Beverley*, 15 Beav. 540; 6 D. M. & G. 256, 265; 6 H. L. Cas. 189; *Att.-Gen. v. Trin. Coll., Camb.*, 24 Beav. 383.

(e) Story's Eq. Jur. § 1178, 1181; 2 Spence's Eq. Jur. 248; 1 Jarm. Wills, 2nd ed. 482; *Philpott v. St. George's Hospital*, and *Re Ashton's Charity*, 27 Beav. 107, 115; *Merchant Taylor's Comp. v. Att.-Gen.*, L.R. 11 Eq. 35; affirmed, L.R. 6 Ch. Ap. 512.

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in regard to  
lapse of  
time;

in regard  
to per-  
petuities.

5. Lapse of time is not an equitable bar in the case of charitable trusts (a). But they are within the Statute of Limitations, 3 & 4 Will. 4, c. 27, s. 24 (b). **736.**

6. A gift to a charity may be made dependent on a condition precedent involving the occurrence of an uncertain event. If personal estate is once effectually given to a charity, the rule against perpetuities has no application. If, therefore, there is an immediate dedication of property to charity, however generally and indefinitely, the particular application of the fund may be directed to take effect at a time or on an event which is entirely contingent, and may never arrive or happen. As where a testatrix expresses her intention to be "to return her money in charity to God who gave it," and then she bequeathed it to trustees (inter alia) upon trust, when and as soon as land should be given for the purpose, that an almshouse should be built (c). **737.**

Proviso as  
to charita-  
ble pur-  
poses being  
held void

Where the donor of a fund to be devoted to a superstitious purpose, provides, in the deed of disposition, that, in case the purpose shall be adjudged void and incapable of being carried into effect, then the fund shall be in trust for his executors and administrators, the trust will be sustained, and the Crown will not be entitled (d). But where a testator gave the residue of his personal property, upon trust for the establishment of a charitable receptacle, if the same could be done, for a number of poor people; but if no such institution could be conveniently established, he requested that the property be disposed of in certain charitable donations; such a bequest was held void under

(a) Story's Eq. Jur. § 1192; *Att.-Gen. v. Corp. of Beverley*, 6 D. M. & G. 256.

(b) *Magdalen College v. Att.-Gen.*, 6 H. L. Cas. 189; *Att.-Gen. v. Darcy*, 4 D. & J. 136.

(c) Tudor's Char. Trusts, 2nd ed.

7, 251; *Thomson v. Shakespear*, 1 D. F. & J. 399; *Carne v. Long*, 2 D. F. & J. 75; *Chamberlayne v. Brockett*, L. R. 8 Ch. Ap. 206; *Re Dutton*, L. R. 4 Ex. D. 54.

(d) 2 Rep. Leg. by White, 1125

the Statute of Mortmain, on the ground that the primary and direct object was the acquisition of a dwelling-house for the charitable purpose ; and it was only in case no such institution could be “conveniently” established, and not in case it could not be lawfully established, that the bequest over was to take effect (a). 738.

Pr. II. T. 8.  
Ch. 2, s. 5.

## II. *Dispositions in favour of Charities void under the Mortmain Act (b).*

The Mortmain Act, 9 Geo. 2, c. 36, is intituled, “An Act to restrain the disposition of lands, whereby the same become unalienable.” This title agrees with the preamble, but only expresses one of the two intents expressed or intimated in the preamble. The preamble is in these words : “Whereas gifts or alienations of lands, tenements, or hereditaments, in mortmain, are prohibited or restrained by Magna Charta, and divers other wholesome laws, as prejudicial to and against the common utility ; nevertheless this public mischief has of late greatly increased by many large and improvident alienations or dispositions made by languishing or dying persons, or by other persons, to uses called charitable uses, to take place after their deaths, to the disherison of their lawful heirs.” 739.

Title of  
the Act.

Preamble.

By section 1, it is enacted, that “no manors, lands, tenements, rents, advowsons, or other hereditaments, corporeal or incorporeal, whatsoever, nor any sum or sums of money, goods, chattels, stocks in the public funds, securities for money, or any other personal estate whatsoever, to be laid out or disposed of in the purchase of any lands, tenements, or hereditaments, shall be given, granted, alienated, limited, released, transferred, assigned or appointed, or any ways

Mortmain  
Act, s. 1.

(a) *Att.-Gen. v. Hodgson*, 15 Sim. 146, and 10 Jur. 300.

180—3 ; and see *Jawncsey v. Att.-Gen.*, 3 Gif. 319, 320.

(b) See 1 Jarm. Wills, 2nd ed.

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Ch. 2, s. 5.

conveyed or settled to or upon any person or persons, bodies politic or corporate, or otherwise, for any estate or interest whatsoever, or any ways charged or incumbered, by any person or persons whatsoever, in trust or for the benefit of any charitable uses whatsoever; unless such gifts, conveyance, appointment or settlement of any such lands, tenements, or hereditaments, sum or sums of money, or personal estate (other than stocks in the public funds) be and be made by deed indented, sealed, and delivered in the presence of two or more credible witnesses, twelve calendar months at least before the death of such donor or grantor (including the days of the execution and death), and be enrolled in His Majesty's High Court of Chancery, within six calendar months next after the execution thereof, and unless such stocks be transferred in the public books usually kept for the transfer of stocks six calendar months at least before the death of such donor or grantor (including the days of the transfer and death), and unless the same be made to take effect in possession for the charitable use intended, immediately from the making thereof, and be without any power of revocation, reservation, trust, condition, limitation, clause, or agreement whatsoever, for the benefit of the donor or grantor, or of any person or persons claiming under him." 740.

It appears, then, that the two descriptions of things within this 1st section, are, first, hereditaments corporeal and incorporeal; secondly, personal estate to be invested in the purchase of hereditaments. It also appears from this section that neither of these things can be conveyed, charged, or incumbered for the benefit of a charitable use, except subject to these restrictions: First, that (except in the case of stock) the disposition be by indenture sealed and delivered in the presence of two or more witnesses, at least twelve calendar months before the death of the donor or grantor, and enrolled in Chancery within six calendar

months after the execution thereof ; and that in the case of stock, it be transferred at least six calendar months before the death of the donor or grantor. And secondly, that the deed or transfer be made to take immediate effect in possession for the charitable use, without any arrangement for the benefit of the donor or grantor, or any person claiming under him (a). **741.**

Pr. II. T. 3.  
Ch. 2, s. 5.

But we shall presently see that the 3rd section of the Act has the effect of extending the prohibitions of the 1st section ; and, on the other hand, that by recent statutes, other enactments have been made on the subject. **742.**

By s. 2, it is enacted, that, "Nothing hereinbefore mentioned relating to the sealing and delivering of any deed or deeds twelve calendar months at least before the death of the grantor, or to the transfer of any stock six calendar months before the death of the grantor or person making such transfer, shall extend or be construed to extend to any purchase of any estate or interest in lands, tenements, or hereditaments, or any transfer of any stock, to be made really and bona fide for a full and valuable consideration actually paid at or before the making such conveyance or transfer without fraud or collusion." **743.**

Mortmain  
Act, s. 2.

The reason why the 2nd section of the Mortmain Act exempts deeds of purchase in favour of charitable uses for a full and valuable consideration from the necessity of being executed a certain time before the death of the grantor, is, that such transactions were not within one of the mischiefs sought to be remedied by that Act, as disclosed in the preamble. Where the grantor obtains an adequate valuable consideration for the alienation of the property to a charitable use, it matters not whether the alienation took place a year or only a day before his death, or whether he was in the full vigour of health, or in a dying or weak state. But, even in the case of a purchaser

(a) *Wickham v. Marquis of Bath*, L. R. 1 Eq. 17.

Pr. II. T. 8.  
Ch. 2, a. 5.

for valuable consideration, it might be desirable that the deed should be attested by two witnesses, and enrolled. For it would seem only reasonable that the evidences of transfer to charitable uses should be peculiarly complete, on account of the great importance of such transfer to the community. 744.

Stat. 9 Geo.  
4, c. 85.

By the stat. 9 Geo. 4, c. 85, after reciting that the 2nd section of the Mortmain Act "was only intended to prevent such purchases from being avoided, by reason of the death of the grantor within twelve calendar months after the sealing and delivery of the deed or deeds relating thereto; and that it had been generally apprehended that the said last-mentioned provision was intended wholly to exempt such purchases from the operation of the said Act, and in consequence thereof the formalities by the said Act prescribed, in relation to the conveyance of hereditaments to charitable uses, had in divers instances been omitted on purchases for a full and valuable consideration, and by reason of such omission the title to such hereditaments might be considered defective, it is enacted that where any lands, tenements, and hereditaments, or any estate or interest therein, have or has been purchased for a full and valuable consideration, in trust or for the benefit of any charitable uses whatsoever, and such full and valuable consideration has been actually paid for the same, every deed or other assurance already made for the purpose of conveying or assuring such lands, tenements, or hereditaments, estate or interest as aforesaid, in trust or for the benefit of such charitable uses (if made to take effect in possession, for the charitable use intended, immediately from the making thereof, and without any power of revocation, reservation, trust, condition, limitation, clause, or agreement whatsoever, for the benefit of the grantor, or of any person or persons claiming under him), shall be as good and valid, and of the same effect, both for establish-



PR. II. T. 8.  
CH. 2, s. 5.

ing deprivative titles, and in all other respects, as if the several formalities by the said Act prescribed had been duly observed and performed (a). Provided always, that nothing in this Act contained shall extend to give effect to any deed or other assurance heretofore made, so far as the same has been already avoided by suit at law or in equity, or by any other legal or equitable means whatsoever, or to affect or prejudice any suit at law or in equity actually commenced for avoiding any such deed or other assurance, or for defeating the charitable uses in trust or for the benefit of which such deed or other assurance may have been made (b). Provided also, and be it further enacted, that nothing herein contained shall be construed to dispense with any of the said several formalities prescribed by the said recited Act, in relation to any deed or other assurance which shall be made after the passing of this present Act" (c). 745.

This is a very remarkable instance of the defective manner in which statutes are too often framed. The second section of the Mortmain Act had provided that nothing contained in the first section relating to the sealing and delivery of any deed twelve calendar months before the death of the grantor, should apply to the case of bonâ fide purchases for valuable consideration. From these words, it became a common opinion that the second section was intended to exempt purchases for valuable consideration from the operation of the first section, so as to render the formalities prescribed in the first section unnecessary in the case of such purchases. And such formalities had consequently been altogether omitted in the case of many purchases. The statute 9 Geo. 4, c. 85, was intended to set this right. And as to past transactions, it did so, by validating them, notwithstanding the omission of all

(a) Sect. 1; *Fisher v. Brierley*, 10 H. L. Cas. 159.

(b) Sect. 2.

(c) Sect. 3.

**Pr. II. T. 8.** the forms. But as to future transactions, the statute of  
**Ch. 2, s. 5.** 9 Geo. 4 recited in effect that the true intention of the second section of the Mortmain Act was merely to dispense with the execution of the deed twelve months before the death of the grantor, and yet the statute 9 Geo. 4 provided that nothing in the Act should be "construed to dispense with *any* of the forms prescribed" by the Mortmain Act. So that as to future transactions, while the statute of 9 Geo. 4 was only intended to explain that by the second section of the Mortmain Act, one particular form only was designed to be dispensed with, yet the third section of the statute of 9 Geo. 4 treats the Mortmain Act as if it did not dispense with *any* of the forms in the case of purchases for valuable consideration. **746.**

Notwithstanding this, however, it would seem the third section of the statute 9 Geo. 4 cannot have the effect of nullifying the second section of the Mortmain Act as to purchases for valuable consideration, but it follows from the recital in the statute of 9 Geo. 4, that the only form dispensed with by the second section of the Mortmain Act as to such purchases, is that of executing the deed twelve months before the death of the grantor; and that it was still necessary, even in the case of purchases for valuable consideration, that the deed should be sealed and delivered in the presence of two or more witnesses, and that it should be enrolled within six calendar months next after the execution thereof. Upon this subject, however, fresh enactments have recently been made (a). **747.**

**Mortmain  
Act, s. 3.**

By s. 3 of the Mortmain Act, "all gifts, grants, conveyances, appointments, assurances, transfers, and settlements whatsoever, of any lands, tenements, or other hereditaments, or of any estate or interest therein, or of any charge or incumbrance affecting or to affect any lands, tenements, or hereditaments, or of any stock, money,

(a) See *infra*, pages 343—355.

goods, chattels, or other personal estate, or securities for money to be laid out or disposed of in the purchase of any lands, tenements, or hereditaments, or of any estate or interest therein, or of any charge or incumbrance affecting or to affect the same, to or in trust for any charitable uses whatsoever, which shall at any time from and after the said 24th day of June, 1736, be made in any other manner or form than by this Act is directed and appointed, shall be absolutely, and to all intents and purposes, null and void." **748.**

Pr. II. T. 3,  
Ch. 2, s. 5.

This section is much more extensive in its terms than the first section : it not only speaks of "hereditaments," but also of "any estate or interest therein, or of any charge or incumbrance affecting them." And it not only speaks of personal estate to be laid out in the purchase of hereditaments, but also of personal estate to be laid out in the purchase of "any estate or interest therein, or of any charge or incumbrance affecting the same." So that to understand the prohibitions of the Mortmain Act, we must take the first section and the third section, and amalgamate them together. **749.**

It may be collected from the preamble of the Act, that the objects sought to be accomplished by the statute are twofold : First, to prevent dispositions of lands, tenements, or other hereditaments, or any estate or interest therein, or any charge or incumbrance affecting the same, etc., to such uses that such lands, tenements, or other hereditaments, or estate or interest therein, or charge or incumbrance, etc., could not be alienated. And secondly, to prevent dispositions tending to the undue disherison of lawful heirs. And such being the case, the true view upon principle appears to be that when a testamentary disposition in favour of a charity does not tend to render any lands, tenements, or other hereditaments, or any estate or interest therein, or any charge or incumbrance affecting

Objects  
of the  
Mortmain  
Act.

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Ch. 2, s. 5.

the same, etc., unalienable, and does not tend to the disherison of lawful heirs, such a testamentary disposition does not contravene the statute. **750.**

Leaning of  
the autho-  
rities.

The authorities, with the exception of some which have been very properly overruled, appear to be in accordance with this view. If there are any decisions contrary to this view which have not been overruled as yet, probably the time is at hand when they will be set aside. The strong leaning of the judges in the earlier cases was to extend the operation of the Mortmain Act as far as possible. But the tendency of the highest modern authorities is strongly against any extension of its operation. **751.**

Cases  
within the  
Mortmain  
Act.

With regard to the particular cases within the Mortmain Act:—

Terms.

1. The statute applies to terms for years (*a*); for the third section expressly mentions “any interest” in hereditaments, and the gift of a term to a charity may virtually have the effect of rendering the term and the land itself unalienable. **752.**

Charges  
on realty  
and estates  
in mortgage

2. The statute applies to money secured on mortgage, legacies charged on land, and other charges on real estate, whether legal or equitable. For “charges and incumbrances” are expressly mentioned in the third section; and the charge or mortgage tends pro tanto to the disherison of the heir. And of course that statute applies to devises by mortgagees of the estates in mortgage to them (*b*). And it has been held that it applies to arrears of mortgage interest (*c*). **753.**

Money to  
exonerate  
lands in  
mortmain

3. The statute has been held to apply to a bequest of money to exonerate lands in mortmain; as being in effect a purchase of a charge or incumbrance for the benefit

(*a*) 2 Rep. Leg. by White, 1131;  
*Bunting v. Sargent*, L. R. 13 Ch.  
D. 330.

30 Beav. 153; *Lucas v. Jones*, L. R.  
4 Eq. 73; *Chandler v. Howell*, L. R.  
4 Ch. D. 651.

(*b*) 2 Rep. Leg. by White, 1128,  
1131; *Alexander v. Brame* (No. 2),

(*c*) *Alexander v. Brame* (No. 2),  
30 Beav. 153.

of the charity, and, as such, being within the third section (a). **754.**

Pr. II. T. 8,  
Ch. 2, s. 5.

4. Whether rightly or wrongly, the statute has been held to apply to money secured on turnpike and canal tolls, poor rates, county rates, and borough rates, mortgages of railways and canals, and duties payable to a dock company; to the profits arising from mooring chains in the river Thames; to navigation shares in canals and rivers, where they are real estate; and to judgment debts due to the testator which in his life had been reported in a creditor's suit to be an incumbrance affecting the real estate of the debtor (b). Although these are interests in or charges upon land in a wide and indirect sense, yet it may fairly be doubted whether they are within the true meaning of the Act (c); and consequently they form a trap for the unwary practitioner. **755.**

Money on  
tolls, rates,  
railways,  
and canals;  
profits from  
mooring  
chains,  
navigation  
shares, and  
judgment  
debts.

[It has, however, recently been decided, that bonds issued as security for money borrowed by commissioners for the improvement of an estate under an Act of Parliament (6 Vict. c. 33), in the form given in the Schedule to the Act, which were, in fact, mortgages of rates levied on occupiers of hereditaments within the limits of the Act, and recoverable by distress on chattels, do not savour of realty within the meaning of the Mortmain Act, but are pure personalty, and that bequests of such bonds are not void under that Act (d).] **755a.**

5. A charitable gift (not made as required by the statute) of money to be expended in the erection or repair of buildings is void, unless it appears on the face of the will or other instrument, or by sufficient extrinsic evidence, or is

Money to  
be expended  
in the erec-  
tion or  
repairing of  
buildings.

(a) 2 Rep. Leg. by White, 1134 ;  
*In re Lynall's Trusts*, L. R. 12  
Ch. D. 211.

(b) 2 Rep. Leg. by White, 1137—  
9 ; *Ashton v. Lord Langdale*, 4 De  
G. & Sm. 402 ; *Walker v. Milne*,

11 Beav. 507, 509 ; *Alexander v.*  
*Brame* (No. 2), 30 Beav. 153.

(c) See *infra*, par. 775—6.

(d) *Jervis v. Lawrence*, L. R. 22  
Ch. D. 202.

Pr. II. T. 3.  
Ch. 2, n. 5.

fairly presumable from the nature of the case, that it was intended that the money so bequeathed should be expended on some land then already in mortmain (a). 756.

Lien for  
purchase  
money.

6. The lien of a testator for the unpaid purchase money of land which he had contracted to sell, has been held to be an interest in land under the Statute of Mortmain, so that the purchase money will not pass by his will to a charity (b). 757.

The propriety of this decision may be questioned. It is true that the vendor's lien for the unpaid purchase money is an interest in land and a charge on the land; and the prohibition of the third section of the statute expressly extends to "interests in" and "charges on" land; but this does not appear to be the kind of interest or charge referred to by the legislature. The case does not seem within either of the two mischiefs intended to be guarded against. Such a disposition does not tend to make the land unalienable, but is itself founded in alienation: nor does it tend to the disinheriting of the heir; for he has been already disinherited by the contract entered into by the testator. If the testator had actually received the purchase money, he might have bequeathed it the next hour to a charity; why should he not have the same power over it, when unpaid, but due from the purchaser? 758.

Premium  
for a lease

However, Malins, V.-C. (to whom no such considerations were presented), assumed that the lien of a testator for unpaid purchase money is within the Statute of Mortmain,

(a) *Pritchard v. Arbouin*, 3 Russ. 456; *Giblett v. Hobson*, 3 My. & Keen 517, 529; and remarks in *Philpott v. St. George's Hospital*, 6 H. L. Cas. 338, 355—6, 358, 360—1, 364—5, 370, 374; *Cramp v. Playfort*, 4 K. & J. 479; *Hopkins v. Phillips*, 3 Gif. 182; *Creswell v. Creswell*, L. R. 6 Eq. 69; *Thornton v. Kempson*, Kay 592; *In re Lang-*

*ham's Trust*, 10 Hare 446; *In re Watmough's Trusts*, L. R. 8 Eq. 272 (a decision which seems wrong; see *infra*, par. 769, note (c)); *Hawkins v. Allen*, L. R. 10 Eq. 246; *Pratt v. Harrey*, L. R. 12 Eq. 544; *In re Cox, Cox v. Darie*, L. R. 7 Ch. D. 204.

(b) *Harrison v. Harrison*, 1 Russ. & My. 71.

and he held that money to be paid by way of premium for a lease is in exactly the same position as purchase money, whether there was a rent reserved together with the premium or not (a). **758a.**

Pr. II. T. 8.  
Ch. 2, s. 5.

7. Although the Mortmain Act does not mention the case of a bequest of the proceeds of a sale of land directed by the will to be sold, yet it is settled that a bequest of the whole or any part of such proceeds is within the spirit and meaning of the Act, and therefore void (b). In such a case, so far from the gift tending to restrain alienation, by the very terms of the gift alienation is to precede the possession of the testator's bounty. But then such a disposition amounts to the disherison of the heir by will, and therefore it has been held to be within the prohibitions of the statute. **759.**

Proceeds  
of sale of  
land.

8. A bequest of money to a society established for assisting the owners of impropriate tithes by money payments to restore them to spiritual purposes, is void under the Statute of Mortmain, and is not rendered valid by the stat. 13 & 14 Vict. c. 94, s. 23 (c). **760.**

Bequest to  
restore  
tithes.

9. It has been held that although a deed of gift of a rent charge to trustees for a charitable purpose be free from all objection on the face of it, yet it is void under the Mortmain Act, if there was any agreement or understanding among the parties to it, when it was executed, that payment of the annuity should not be enforced during the life of the grantor, or if such was his design in executing it, and that design is acquiesced in by all the parties (d).

Secret  
reservation  
of life  
interest to  
grantor.

(a) *Shepherd v. Bertham*, L. R. 6 Ch. D. 597, 600.

(b) *Att.-Gen. v. Lord Weymouth*, Amb. 20; *Curtis v. Hutton*, 14 Ves. 537; *Trustees of the British Museum v. White*, 2 S. & S. 595; *Waite v. Webb*, 6 Madd. 71; *Currie v. Pye*, 17 Ves. 462; *Page v. Leapingwell*,

18 Ves. 464; *Incorporated Church Building Society v. Cox*, 5 D. M. & G. 324; *Brook v. Badley*, L. R. 4 Eq. 106; 3 Ch. Ap. 672; *Ashworth v. Munn*, L. R. 15 Ch. D. (Ap.) 363.

(c) *Denton v. Lord John Manners*, 25 Beav. 38; 2 D. & J. 675.

(d) *Way v. East*, 2 Drewry 44.

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Ch. 2, s. 5.

For by the first section of the statute, deeds of gift for charitable purposes are expressly void, "unless the same be made to take effect in possession for the charitable use intended immediately from the making thereof, and be without any agreement whatever for the benefit of the donor or grantor or of any person or persons claiming under him" (a). 761.

Legacy  
duty.

10. The legacy duty on charitable legacies given free of duty cannot be paid out of impure personalty (b). 762.

### III. *Exemptions, or Cases not within the Mortmain Act.*

Trusts for  
the Univer-  
sities, or for  
colleges  
therein, or  
for Eton,  
Winchester,  
or West-  
minster.

1. By the 4th section it is provided, "that this Act shall not extend, or be construed to extend, to make void the dispositions of any lands, tenements, or hereditaments, or of any personal estate to be laid out in the purchase of any lands, tenements, or hereditaments, which shall be made in any other manner or form than by this Act is directed, to or in trust for either of the two Universities, or any of the colleges or houses of learning within either of the said Universities, or to and in trust for the colleges of Eton, Winchester, or Westminster, or any or either of them, for the better support and maintenance of the scholars only upon the foundations of the said colleges of Eton, Winchester, or Westminster." 763.

Scotch  
property.

2. By the 6th section, the Act is not to extend to Scotland. 764.

Irish  
property.

3. Nor does it extend to Ireland. But by the stat. 7 & 8 Vict. c. 67, s. 16, it is enacted, "That after the commencement of this Act, no donation, devise, or bequest for pious or charitable uses in Ireland shall be valid to create or convey any estate in lands, tenements, or hereditaments for such uses, unless the deed, will, or other

(a) See *Fisher v. Brierley*, 1 D. F. & J. 643; 10 H. L. Cas. 159.

(b) *Wilkinson v. Barber*. L. R. 14 Eq. 96.



instrument containing the same shall be duly executed three calendar months at the least before the death of the person executing the same, and unless every such deed or instrument, not being a will, shall be duly registered in the office for registering deeds in the city of Dublin within three calendar months after the execution thereof." 765.

Pr. II. T. 8,  
Ch. 2, s. 5.

4. The Mortmain Act does not apply to India or the West Indies (a). Nor does it apply to our colonies, where there is no express legislative enactment in this country, that it shall apply to them. And it does not apply to New South Wales, notwithstanding the stat. 9 Geo. 4, c. 83, s. 24 (b). 766.

Colonial  
property.

5. Where trustees are not required or directed to invest in real estate money bequeathed to charity, but it is merely left to their discretion to do so or not, the bequest has been supported, upon the principle that the trustees ought not to be permitted to exercise that discretion to the prejudice of legatees (c). And where residuary personal estate, including impure personalty, is bequeathed to trustees, upon trust to divide the same among such charities in England as they in their sole and uncontrolled discretion shall think proper, it is equivalent, as to the impure personalty, to a gift to charities exempt from the Mortmain Act, to be selected by the trustees, and therefore a valid gift for such a purpose (d). And, a fortiori, the bequest is valid where there is a direction that the trustees shall have regard to

Discretion-  
ary invest-  
ment.

(a) Tudor's Lead. Ca. in Conv. 438.

(b) *Wicker v. Hume*, 14 Beav. 524; 1 D. M. & G. 506; 7 H. L. Cas. 124.

(c) 2 Rep. Leg. by White, 1145; *Carter v. Green*, 3 K. & J. 591; *University of London v. Yarrow*, 1 D. & J. 74, 81; *Mayor of Rotherham v. Ryder*, 18 Beav. 318; 5 D. M. & G. 350; *Graham v. Paternoster*,

31 Beav. 30; *Re Beaumont's Trusts*, 32 Beav. 191; *Tatham v. Drummond*, 12 W. R. 620; *Wilkinson v. Barber*, L. R. 14 Eq. 96.

(d) *Lewis v. Allenby*, L. R. 10 Eq. 668. In this case the bequest was made by a codicil to a will by which the testator gave charitable legacies to be paid out of such part of his personal estate as might by law be bequeathed for charitable purposes.

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Ch. 2, s. 5.

the application thereof being consistent with the laws in force (a). **767.**

Devise by a  
freeman of  
London.

6. It would seem from *Middleton v. Cator* (b), that by the custom of London, a freeman of London may devise in mortmain land within the city. **768.**

Melioration  
of lands in  
mortmain,  
or building  
upon them.

7. Bequests may be made of money to be applied simply in melioration of lands in mortmain, or for building upon them (c). And hence a legacy for building a parsonage house is not within the Mortmain Act, if there is land belonging to the living upon which a house may be built (d). And so if a bequest is made to the trustees of a dissenting chapel in a certain town or parish, to be applied towards the erection of a new chapel there, and land in that town or parish is duly vested in trustees at the date of the will, on which a new chapel could be built in substitution for the old one, the bequest is valid (e). In the case of *Adnam v. Cole* (f), it was held that the gift of money to arise from the sale of chattels real for the purpose of building an organ gallery and purchasing an organ for the parish church, was within the statute and void. But the point was not argued, and the decision was clearly wrong. **769.**

Charitable  
endow-  
ments, gifts  
to the in-  
corporated  
Church  
Building  
Society,  
and esta-  
blishment

8. Where a testator directs his executors, as opportunity may offer, to apply such part or parts of the residue of his personal estate as may be legally applied to such purposes, in the endowment of district churches or chapels, in populous parishes, such a gift is good, regarded as a gift

(a) *Dent v. Allcroft*, 30 Beav. 335.

(b) 4 B. C. C. 410.

(c) 2 Rep. Leg. by White, 1165 ;  
*Carter v. Green*, 3 K. & J. 591.

(d) *Sewell v. Crewe-Read*, L. R. 3 Eq. 60.

(e) *Booth v. Carter*, L. R. 3 Eq. 757. V.-C. *Malins*, in *Re Watmough's Trusts*, L. R. 8 Eq. 272, declined to follow this case, and decided the contrary. The author conceives that the view taken by the very learned

Vice-Chancellor was wrong, as a gratuitous disappointment of the testator's bounty, and as repugnant to the principle that a testator is presumed to intend that which is consonant to law, rather than the reverse, and to the principle *ut res magis valeat quam pereat*. The true rule (the author conceives) is that stated in par. 756.

(f) 6 Beav. 353.

in favour of existing churches or chapels, if not when made in favour of churches or chapels to be hereafter built (*a*). And so a bequest of money, for the enlargement of a parish church, is good (*b*). And so a bequest for "the foundation of a charitable endowment" is not within the statute (*c*). And a bequest of a sum of money to "The Incorporated Society for Promoting the Enlargement, Building, and Repairing of Churches and Chapels" is good, inasmuch as it is held that the society has no power to purchase lands (*d*). But a "bequest for the purpose of establishing a hospital," without negating an intention that the money should be applied in building at all, or otherwise than on land already in mortmain, is void; as the erection of a building is essential to a hospital (*e*). A bequest for the establishment of a school may be either void or not, according to circumstances. If there was an intention that any part of the money should be expended in building on land not already in mortmain, it is void (*f*). But a gift by will of money to trustees to be applied in "supporting" or "founding" a school is good as an alternative trust; for the "support" does not necessarily involve the acquisition of any lands, tenements, or hereditaments (*g*). **770.**

Pr. II. T. 8,  
Ch. 2, s. 5.  
of a school  
or hospital.

9. Policies of assurance are not so connected with land as to be within the Mortmain Act, although the assets of the assurance companies, out of which the amount assured is to be paid, consist partly of real estates (*h*). **771.**

Policies.

10. Arrears of rent are not an estate or interest in land

Arrears of  
rent.

- (*a*) *Edwards v. Hall*, 6 D. M. & G. 600.  
74.  
(*b*) *Re Hawken's Trusts*, 33 Beav. 570.  
(*c*) *Salisbury v. Denton*, 3 K. & J. 529.  
(*d*) *The Incorporated Society, etc. v. Burton*, 3 D. M. & G. 120.  
(*e*) *Dunn v. Bownass*, 1 K. & J. 431.  
(*f*) *Att.-Gen. v. Williams*, 2 Cox 387; *Att.-Gen. v. Hull*, 9 Hare 647; *Longstaff v. Rennison*, 1 Drewry 28; *Hartshorne v. Nicholson*, 26 Beav. 58.  
(*g*) *In re Hedgman, Morley v. Croxon*, L. R. 8 Ch. D. 156.  
(*h*) *Murch v. Att.-Gen.*, 5 Beav. 431.

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Ch. 2, s. 5.

within the Mortmain Act (a). Nor is an apportioned part of rent up to the testator's death (b). 772.

Devise for  
certain poor  
families  
named.

11. If real estate is devised to a vicar and churchwardens and their successors, and certain other trustees, their heirs and assigns, upon trust to distribute the rents and profits annually, on a certain day, amongst certain families named, according to their circumstances, as in the opinion of the trustees they might need such assistance, this is a beneficial devise to objects who may lawfully take land by devise, and therefore not void within the Statute of Mortmain (c). 773.

Railway  
debentures.

12. Such debentures in a trading company as are mortgages, are not within the Act (d). 774.

Shares in a  
company.

13. Shares in a company are not within the Mortmain Act. And this is the case even where it may happen that all their property may at any given time consist of real estates or chattels real, if by the Act of Parliament or by the deed by which the company was established, the shares are declared to be personal estate, or if the right of the shareholder is merely a right to call for his share of the profits, and not for a specific part of the land itself. Thus it has been very properly held that the Act does not extend to shares in a gas-light and coke company, or in a dock company, or in a waterworks company, or in a railway or canal company, or in a banking company, even though unincorporated, and though its assets consisted of real estate and mortgages, or in a mining company where the interest of the shareholders is limited to the profits, or in a land company or society for purchasing or improving lands and selling or letting the same, or for raising funds

(a) *Edwards v. Hall*, 6 D. M. & G. 74; *Malins, V.-C.*, in *Shepherd v. Bretham*, L. R. 6 Ch. D. 599.

(b) *Thomas v. Howell*, L. R. 18 Eq. 198, 204.

(c) *Liley v. Hey*, 1 Hare 580.

(d) *Ashton v. Lord Langdale*, 4 De G. & Sm. 402; *Holdsworth v. Darnport*, L. R. 3 Ch. D. 185; *In re Mitchell's Estate*, *Mitchell v. Moberly*, L. R. 6 Ch. D. 655.

for enabling each of the subscribers to buy houses or lands (a). **775.**

Pr. II. T. 8,  
Ch. 2, s. 5.

The truth is, a share in a company, where it is not real estate, though it may savour of the realty, is not like the share in lands of a tenant in common, but it is practically and virtually a mere share in pure personalty. It is practically and virtually a mere share in the profits of the undertaking for the purposes of which the company was established, while the company continues to exist, attended with a right to participate in the proceeds of the sale of the aggregate property, whatever it be, in the contingent event of the company being dissolved. A share is an entire thing; and if it is a share in a company the property of which is partly real and partly personal, in proportions which cannot be determined, it is impossible to say that such a share is real property which devolves upon the heir. And even if it is a share in a company the property of which consists entirely of real estate, yet if, by the Act of Parliament or deed whereby the company was established, the shares are declared to be personal estate, such shares are then practically and virtually shares in pure personalty. **776.**

14. Where a covenant is entered into, that the covenantor, or his executor after his decease, would invest a

Covenant  
to invest  
money on  
charitable  
trusts.

(a) 2 Rop. Leg. by White, 1179; *Hayter v. Tucker*, 4 K. & J. 243; *Thompson v. Thompson*, 1 Coll. C. C. 381; *Sparling v. Parker*, 9 Beav. 457; *Hilton v. Giraud*, 1 De Gex & Sm. 183; *Walker v. Milne*, 11 Beav. 507; *Ashton v. Lord Langdale*, 4 De G. & Sm. 402; *Myers v. Perigal*, 2 D. M. & G. 599, overruling *Tomlinson v. Tomlinson*, 9 Beav. 459; and *Edwards v. Hall*, 6 D. M. & G. 74, overruling *Ware v. Cumberlege*, 20 Beav. 503; *Linley v. Taylor*, 1 Gif. 67; 2 D. F. & J. 84; *Entwistle v.*

*Davis*, L. R. 4 Eq. 272; *Attree v. Have*, L. R. 9 Ch. D. (Ap.) 337. In *Morris v. Glynn*, 27 Beav. 218, it was held that shares in a mining company are within the Act; and though this would seem clearly opposed to authority and principle (see 1 Jarm. Wills, 3rd ed. 205, and remarks of V.-C. Wood, in L. R. 4 Eq. 275), yet it would be only prudent to devote such property to charitable objects privileged from exemption from the Act.

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Ch. 2, s. 5.

sum of money upon charitable trusts, such a covenant is invalid, as within the Mortmain Act (a). 777.

Bequest as  
an induce-  
ment to  
bring lands  
into mort-  
main.

15. A bequest to a person on condition that he convey land to a charity is void, as in effect a giving of money to be laid out in the purchase of lands (b). But with this exception, a bequest for a charity is not void, merely because it may be so given as to lead others to bring fresh land into mortmain. And hence, where a testator directed that if any person within a certain time should give a suitable piece of land as a site for almshouses, his executors should pay the trustees a sum of money for the purpose of the charity, but so that the said sum of money, nor any part thereof, should not be applied in or towards the purchase of any lands; it was very properly decided by the House of Lords that the bequest was good (c). And so, where a legacy is bequeathed in trust to apply the dividends towards the maintenance, support, and carrying on of a school to be established in a certain parish, with an express direction that the said sum shall not, nor shall any part of it, be applied in the purchase of land or in the purchase or erection of buildings, the testator stating his expectation that other persons will at their expense purchase the necessary land and buildings for the above-named purpose; such bequest is valid, on the ground that it is not illegal to encourage others to do what the Act declares may be done legally in a manner thereby prescribed (d). 778.

It has been justly remarked, "It is no doubt the duty of the Courts so to construe statutes as to suppress the

(a) *Jeffries v. Alexander*, 8 H. L. Cas. 594, reversing decision of the Lord's Justices, S. C., nom. *Alexander v. Brame*, 7 D. M. & G. 525; *Fox v. Lownds*, L. R. 19 Eq. 453.

(b) *Att.-Gen. v. Davies*, 9 Ves. 585.

(c) *Philpott v. St. George's Hospital*, 21 Beav. 134; 6 H. L. Cas. 388, 349, 350; *Chamberlayne v. Brockett*, L. R. 8 Ch. Ap. 206.

(d) *Carwood v. Thompson*, 1 Sm. & Gif. 409.

mischief against which they are directed, and to advance the remedy which they are intended to provide ; but it is one thing to construe the words of a statute, and another to extend its operation beyond what the words of it express " (a). " Prohibitory statutes " (observes Lord Cranworth, C.) " prevent you from doing something which formerly it was lawful for you to do ; and whenever you can find that anything that is done is substantially that which was prohibited, I think it is perfectly open to the Court to say that it is void—not because it comes within the spirit of the statute, or tends to effect the object which the statute meant to prohibit, but because, by reason of the true construction of the statute, it is the thing, or one of the things actually prohibited " (b). 779.

Pr. 11. T. 8,  
Om. 2, s. 5.

16. Where a devise or bequest is made, which on the face of it appears to be an absolute gift, but was in reality made in confidence that the property would be devoted to a charitable purpose, such a disposition is good as an absolute gift, which the devisee or legatee may devote to that purpose or not, as he may choose, even though the real intention of the testator may be expressed by some letter or paper accompanying the will, and even though the devisee or legatee knew in the testator's lifetime that the testator wished to devote his property to that purpose, and though after the testator's death the devisee or legatee admits that he intends to devote to it the property devised or bequeathed ; unless he knew in the testator's lifetime that the property was devised or bequeathed with that intent, and either directly or indirectly, by words, or by silence or otherwise, agreed with the testator to carry it into effect (c). And where a devise was made to two per-

Devise or  
bequest  
which on  
the face of  
it is abso-  
lute.

(a) Lord Justice Turner, 7 D. M. & G. 589.

(b) Lord Cranworth, C., in *Philpott v. St. George's Hospital*, 6

H. L. Cas. 349. See also remarks of Lord Brougham, S. C. 268.

(c) *Lomas v. Ripley*, 3 Sm. & Gif. 48 ; *Wallgrave v. Tebbs*, 2 K. & J.

Pr. II. T. 8,  
Ch. 2, s. 5.

sons as tenants in common, and the memorandum which expressed the charitable intent was read to one devisee by the testator, but was unknown to the other devisee until after the testator's death, the gift to the former was affected by a trust, while the gift to the latter was not (a). **780.**

In these cases, it will be perceived, the Court gave effect to the Mortmain Act, by giving the property to the devisee absolutely, and leaving him to devote it to charitable purposes or not, as he might choose, where the devisee did not directly or indirectly agree so to apply it. But it would not seem wise to recommend the adoption of such an expedient where there is any equally important charitable use to which the property may be legally devised, and to which the testator may be willing to devote it. For a devise made to a person in terms which on the face of them import an absolute gift, but in reality made for a charitable purpose, is almost sure to lead to litigation: the devisee is almost sure to be interrogated in the action as to whether he did not know of the devise and the object of it in the testator's lifetime, and whether he did not directly or indirectly agree to give effect to it. And with many there would be a risk of their not devoting the property to the purpose intended. And in all cases there would be a risk of the devisee not surviving the testator, or not surviving him long enough to effect the charitable purpose, and of the property devolving on trustees, infants, or others, who either could not or would not effect that purpose. **781.**

17. By the stat. 43 Geo. 3, c. 108, dispositions of real

Exemption  
by other  
statutes.

313; *Lee v. Ferrers*, Id. 357; *Moss v. Cooper*, 1 Johns. & Hem. 352; *Jones v. Badley*, L. R. 3 Eq. 635; Id. 3 Ch. Ap. 362; *Springett v. Jennings*, L. R. 10 Eq. 488; affirmed, L. R. Ch. Ap. 333; *Howbotham v.*

*Dunnett*, L. R. 8 Ch. D. 430.

(a) *Lee v. Ferrers*, 2 K. & J. 357; see also *Carter v. Green*, 3 K. & J. 591; *Baldwin v. Baldwin*, 22 Beav. 413, 419; *Howbotham v. Dunnett*, L. R. 8 Ch. D. 430.



and personal estate by deed enrolled according to the stat. 27 Hen. 8, c. 16, or by will, to "the Governors of the Bounty of Queen Anne" and their successors, for the augmentation of the maintenance of the clergy; by the stat. 6 & 7 Vict. c. 37, s. 22, extended by the stat. 14 & 15 Vict. c. 97, ss. 8, 24, dispositions of real and personal estate by deed enrolled according to the stat. 27 Hen. 8, c. 16, or by will, to "the Ecclesiastical Commissioners for England" and their successors, for or towards the endowment or augmentation of the income of the clergy, or for or towards providing or repairing any church or chapel; by the stat. 10 Geo. 4, c. 25, s. 37, and the local Act 4 Will. 4, c. 38, s. 1, dispositions, by will or otherwise, of real and personal estate to "the Commissioners of Greenwich Hospital," and to "the President, Vice-President, Treasurers, and Governors of St. George's Hospital" (with a limit to the value of real estate to be held by St. George's Hospital, namely £20,000 per annum), are exempted from the operation of the Mortmain Act. And by other public and general and local Acts dispositions by will or otherwise, in favour of other religious, charitable, and public objects, are also exempted (a).

**782.**

By the stat. 31 & 32 Vict. c. 44, it is enacted, that "all alienations, grants, conveyances, leases, assurances, surrenders, or other dispositions, except by will, *bonâ fide* made after the passing of this Act, to a trustee or trustees, on behalf of any society or body of persons associated together for religious purposes, or for the promotion of education, arts, literature, science, or other like purposes, of land, for the erection thereon of a building for such purposes or any

Pr. II. T. 8.  
Ch. 2, s. 5.

(a) See Stamp's Index to the Statute Law of England. tit. "Mortmain"; 1 Jarm. Wills, 2nd ed. 197—198; Boyle on Charities, 136—

146; Shelford on Mortmain, 240—266. As to Roman Catholic Charities, see 23 & 24 Vict. c. 134.

Pr. II. T. 8,  
Ch. 2, s. 5. of them, or whereon a building used or intended to be used for such purposes or any of them shall have been erected, shall be exempt from the provisions of an Act passed in the ninth year of the reign of King George the Second, and intituled 'An Act to restrain the Disposition of Lands whereby the same become unalienable,' and also from the provisions of the second section of an Act passed in the twenty-fourth year of the reign of her present Majesty, intituled 'An Act to amend the Law relating to the Conveyance of Land for Charitable Uses': provided that such alienation, grant, conveyance, lease, assurance, surrender, or other disposition shall have been really and bonâ fide made for a full and valuable consideration actually paid upon or before the making of such alienation, grant, conveyance, lease, assurance, surrender, or other disposition, or reserved by way of rent, rent-charge, or other annual payment, or partly paid and partly reserved as aforesaid, without fraud or collusion, and provided that each such piece of land shall not exceed two acres in extent or area in each case" (s. 1). **783.**

"Provided always, that the trustee or trustees of any deed or instrument by which any such alienation, grant, conveyance, lease, assurance, surrender, or disposition shall have been made, or the trust thereof declared, may, if he or they shall think fit, at any time cause such deed or instrument to be enrolled in Her Majesty's High Court of Chancery" (s. 2). **784.**

Some statutes only license holding in mortmain, without enabling bodies to take otherwise than under the Mortmain Act.

It is important to observe that in some cases where statutes enable corporate bodies to take and hold lands, this is merely equivalent to a licence from the Crown to hold in mortmain, and does not enable them to take by devise or in any other manner than that prescribed by the stat. 9 Geo. 2, c. 36 (a). But where a charity is

(a) 1 Jarm. Wills, 2nd ed. 198; *gent Blind*, L. R. 11 Eq. 1; *Chester v. Nethercole v. School for the Indi-* *v. Chester*, L. R. 12 Eq. 444; *Luck-*

empowered by an Act of Parliament to acquire, hold, and retain realty or personalty savouring of realty, by will, gift, purchase, or otherwise, this, of course, is tantamount to giving any one power to devise or bequeath such property to the charity (a). **785.**

Pr. II. T. 8.  
Ch. 2, s. 5.

IV. *Provisions of the Statutes* 24 Vict. c. 9; 25 & 26 Vict. c. 17; 26 & 27 Vict. c. 106; 27 Vict. c. 13; 29 & 30 Vict. c. 57; 31 & 32 Vict. c. 44, s. 3; 33 & 34 Vict. c. 34; and 35 & 36 Vict. c. 24.

By the 24 Vict. c. 9, after reciting the Mortmain Act, and the Stat. 9 Geo. 4, c. 85, it is enacted as follows: "No deed or assurance hereafter to be made for any charitable uses

No future  
assurance  
for charita-  
ble uses  
to be void  
by reason

*raft v. Pridham*, L. R. 6 Ch. D. (Ap.) 205.

Without supposing that there are many who are indifferent to the claims of Christian and philanthropic institutions, there are some excellent persons who are so impressed with the duty of liberally contributing to these institutions in their lifetime, that they are apt to look with no favour upon testamentary dispositions for charitable objects. But this is only one of numerous cases in which a great appreciation of one thing very improperly induces a disparagement of other things. Again, there are those who think that there is a great danger of a testator's neglecting the claims of kindred, in the delusive hope that by giving to charities what he can no longer retain, he will further his highest interests. Few, however, in our own communion are so ignorant or misguided in the present day as to become the subjects of such a delusion. And many are the cases in which a testator has no relations for whom he is under any natural or moral obligation to

provide. Many are the cases in which a testator has no relations but those whom he considers to be utterly unworthy of his bounty. Many are the cases in which a testator has no nearer relations but those who are sufficiently provided for. And many are the cases in which he has quite enough to enable him to make a provision for his near relations, and yet to promote the cause of those institutions which are the glory of this land. And in such instances it is important that the solicitor (who may be required to prepare a will at the last moment and without any opportunity of looking at a book) should have in his mind some of the principal charitable objects which are privileged with statutory exemptions from the operation of the Mortmain Act; and that he should accurately know what description of property cannot be made the subject of testamentary dispositions in favour of charities which are not so privileged.

(a) *Perring v. Trail*, L. R. 18 Eq. 88.

Pr. II. T. 8,  
Ch. 2, s. 5.

of not being  
indented, or  
of specified  
stipulations,  
or (as to  
copyholds)  
for want of  
deed.

whatsoever of any hereditaments of any tenure whatsoever, or of any estate or interest therein, shall be deemed to be null and void within the meaning of the first-recited Act by reason of such deed or assurance not being indented, or not purporting to be indented, nor by reason of such deed or assurance, or any deed forming part of the same transaction, containing any grant or reservation of any peppercorn or other nominal rent, or of any mines or minerals, or easement, or any covenants or provisions as to the erection, repair, position, or description of buildings, the formation or repair of streets or roads, drainage or nuisances, or any covenants or provisions of the like nature for the use and enjoyment as well of the hereditaments comprised in such deed or assurance as of any other adjacent or neighbouring hereditaments, or any right of entry on non-payment of any such rent, or on breach of any such covenant or provision or any stipulations of the like nature for the benefit of the donor or grantor, or of any person or persons claiming under him, nor (in the case of any such assurance of hereditaments of copyhold or customary tenure, or of any estate or interest therein) by reason of the same not being made by deed, nor in the case of such assurances made *bonâ fide* on a sale for a full and valuable consideration, by reason of such consideration consisting wholly or partly of a rent, rent-charge, or other annual payment reserved or made payable to the vendor or to any other person with or without a right of re-entry for non-payment thereof: provided always, that in all reservations authorised by this Act the donor, grantor, or vendor shall reserve the same benefits for his representatives as for himself" (s. 1). 786.

Where  
charitable  
uses of any  
future  
assurance

"In all cases where the charitable uses of any deed or assurance hereafter to be made for conveyance of any hereditaments for any charitable uses shall be declared

by any separate or other deed or instrument, it shall not be necessary, for the purposes of the first-recited Act or of this Act, to enrol such deed or assurance for conveyance, but every such deed or assurance for conveyance shall nevertheless be absolutely null and void unless such separate or other deed or instrument shall within six calendar months next after the making or perfecting of such deed or assurance for conveyance be enrolled in Her Majesty's High Court of Chancery, and such enrolment as last aforesaid shall be deemed and treated for all purposes of the first-recited Act and of this Act as if such deed or assurance for conveyance had declared such charitable uses, and had been so enrolled as last aforesaid" (s. 2). **787.**

Pr. II. T. 8.  
Ch. 2, a. 5.  
... are declared by any separate or other instrument, enrolment of such separate or other instrument requisite.

"No deed or assurance heretofore made and under which possession is now held for any charitable uses whatsoever of any hereditaments of any tenure whatsoever, or of any estate or interest therein, made really and bonâ fide for a full and valuable consideration actually paid at or before the making or perfecting such deed or assurance, or reserved by way of rent, rent-charge, or other annual payment, or partly paid at or before the making or perfecting such deed or assurance and partly reserved as aforesaid, without fraud or collusion, shall for any reason whatever be deemed to be null and void within the meaning of the first-recited Act, if such deed or assurance was made to take effect in possession for the charitable uses intended immediately from the making thereof, and without any power of revocation, and has been at any time prior to the passing of this Act, or shall be within twelve calendar months next after the passing of this Act, enrolled in Her Majesty's High Court of Chancery" (s. 3). **788.**

No past assurance for charitable uses upon valuable consideration to be void for any reason, if to take effect immediately in possession and without power of revocation, and if enrolled in Chancery.

"In all cases where the charitable uses of any deed or assurance heretofore made for conveyance of any heredita-

Where charitable uses of any

Pr. II. T. 3.  
Ch. 2, s. 5.

whether the said enactment refers to any hereditaments no of copyhold or customary tenure; be it therefore declared and enacted, that the said enactment comprises and extends to all hereditaments whether of freehold or of customary or copyhold tenure, and to every estate and interest therein" (s. 2). **793.**

As to  
acknow-  
ledgment  
of deeds  
executed  
prior to  
that Act.

"No deed, assurance, or instrument executed previously to the passing of the said Act shall, for the purposes thereof, require acknowledgment prior to enrolment" (s. 3). **794.**

Acts to  
apply to  
separate  
deed  
executed  
after passing  
of that Act.

"And whereas it is by the fourth section of the said Act enacted, that where the charitable uses of any such deed or assurance for conveyance as is therein mentioned had been declared by any separate deed or instrument, then, if neither of the said deeds or instruments had been enrolled, it should not be necessary to enrol such deed or assurance for conveyance, but every such deed or assurance for conveyance should be void, unless such other separate deed or instrument should be enrolled within such time as therein mentioned: and whereas it may happen that such deed or assurance for conveyance may have been executed before the passing of the said Act, but the separate deed or instrument declaring the charitable uses may not have been executed until after the passing of the said Act; be it therefore enacted, that the said Act and this Act shall be taken to apply as well to cases where such separate deed or instrument shall be or shall have been executed after as to cases where it may have been executed before the passing of the said Act; provided only that, if not already executed, it be executed within six months next after the passing of this Act" (s. 4). **795.**

Provision as  
to money  
expended in  
permanent  
improve-  
ments.

"In all cases in which money shall have been really and bona fide expended before the passing of this Act, in the substantial and permanent improvement, by building or otherwise, for any charitable use, of land of any tenure

whatsoever, of which possession is now held by virtue of any deed or assurance conveying or purporting to convey the same, or declaring any trusts or trust thereof for such charitable use, all money so expended shall be deemed, for the purposes of the said Act, equivalent to money actually paid by way of consideration for the purchase of the said land " (s. 5). **796.**

" Nothing in this Act contained shall extend to render null and void any deed or assurance already good and valid " (s. 6). **797.**

By the stat. 26 & 27 Vict. c. 106, after reciting the last Acts and the 9 Geo. 2, c. 36, " every deed or assurance by which any land shall have been demised for any term of years for any charitable use shall, for all the purposes of the said recited Acts, be deemed to have been made to take effect for the charitable use thereby intended immediately from the making thereof, if the term for which such land shall have been thereby demised was thereby made to commence and take effect in possession at any time within one year from the date of such deed or assurance " (s. 1). **798.**

By the stat. 27 Vict. c. 13, after reciting the stat. 24 & 25 Vict. c. 9, and the stat. 25 & 26 Vict. c. 17, " the enrolment of every deed, assurance, and instrument which shall be enrolled before the 17th of May, 1866, shall, for the purposes of the said recited Acts, or either of them, have the same force and effect which it would have had if such enrolment had taken place within the said time by the said Acts respectively limited " (s. 1). **799.**

" This Act shall be taken to apply as well to cases where such separate deed or instrument as is mentioned in the fourth section of the said second Act shall be or shall have been executed after, as to cases where it may have been executed before the passing of the said first Act; provided only, that if not already executed, it be executed within

Pr. II. T. 8,  
Ch. 2, s. 5.

Act not to  
invalidate  
any deed.

Demises for  
charitable  
uses to be  
deemed to  
take effect  
from the  
making  
thereof.

Further  
extension  
of time for  
enrolment  
of assu-  
rances.

Act to apply  
to separate  
instruments  
executed  
after the  
passing of  
the 24 Vict.  
c. 9.

17. II. T. 8, six calendar months next after the passing of this Act ”  
 CH. 2, s. 5. (s. 2). **800.**

Provision  
 where  
 original  
 deed is  
 lost.

“ And whereas it may be impossible in some cases to enrol the original deed creating a charitable trust by reason of the same having been lost or destroyed by time or accident, but nevertheless the trusts of such charity may sufficiently appear by some subsequent deed appointing new trustees, or otherwise reciting the trusts created by the original deed: be it enacted, that in every such case it shall be lawful for any trustee or other person interested in such charitable trust to apply by summons in a summary way to the Court of Chancery for an order authorising the enrolment of such subsequent deed; and if the Court shall be satisfied, by affidavit or otherwise, that such original deed has been lost or destroyed by time or accident, but that the trusts thereof sufficiently appear by such subsequent deed, then it shall be lawful for the said Court to make an order authorising the enrolment of such subsequent deed; and the enrolment thereof shall have the same force and effect as the enrolment of the original deed would have had if the same had not been lost or destroyed as aforesaid ” (s. 3). **801.**

Valuable  
 considera-  
 tion payable  
 as rent to be  
 equivalent  
 to a consi-  
 deration  
 in money  
 actually  
 paid within  
 the statute  
 9 Geo. 2, c.  
 36.

“ Every full and bonâ fide valuable consideration within the meaning of the first section of the said first Act which shall consist either wholly or partly of a rent or other annual payment reserved or made payable to the vendor or grantor, or to any other person, shall for the purposes of the stat. 9 Geo. 2, c. 36, be as valid and have the same force and effect as if such consideration had been a sum of money actually paid at or before the making of such conveyance without fraud or collusion ” (s. 4). **802.**

By the stat. 29 & 30 Vict. c. 57, after reciting the stat. 9 Geo. 2, c. 36, the stat. 24 Vict. c. 9, the stat. 25 Vict. c. 17, and the stat. 27 Vict. c. 13, it is enacted as follows:

Any trustee, “ Any trustee, governor, director, or manager of any



charity, or any other person entitled to act in the management of or otherwise interested in any charitable trust, may by summons in a summary way, and without service thereof upon any person, apply to the Court of Chancery for an order authorising the enrolment in the Court of any deed, assurance, or other instrument whereby any hereditaments of any tenure or any estate or interest therein have or has been or shall be given, granted, or in any way conveyed, settled, or charged for charitable uses, or of any other deed, assurance, or instrument relative to or connected with any charitable trust, and which deed, assurance, or instrument ought to have been enrolled, but has not been enrolled within the time by law limited for that purpose, or (where such deed, assurance, or instrument has been lost or destroyed by time or accident, and the trusts thereof sufficiently appear by some subsequent deed appointing new trustees, or otherwise reciting the trusts created by the original deed, assurance, or instrument) for an order authorising the enrolment of such subsequent deed" (s. 1). **803.**

Pr. II. T. 8,  
Ch. 2, s. 5.  
etc., of any  
charity may  
apply to  
Court of  
Chancery  
for order  
authorising  
enrolment  
of any  
deed, etc.

"If the Court shall be satisfied by affidavit or otherwise that the deed, assurance, or other instrument conveying or charging the hereditaments, estate, or interest for charitable uses was made really and bona fide for full and valuable consideration, actually paid at or before the making or perfecting thereof, or reserved by way of rent-charge or other annual payment, or partly paid at or before the making or perfecting of such deed, assurance, or other instrument, and partly reserved as aforesaid, without fraud or collusion, and that at the time of the application to the Court possession or enjoyment is held under such deed, assurance, or other instrument, and that the omission to enrol the same in proper time has arisen from mere ignorance or inadvertence, or from the destruction thereof by time or accident, it shall be lawful for the Court to make

If Court  
satisfied  
that deed,  
etc., was  
made bona  
fide for  
full and  
valuable  
considera-  
tion, Court  
may make  
order  
authorising  
enrolment.

Fr. II. T. 8,  
Ch. 2, s. 5. an order authorising the enrolment in the Court of the deed, assurance, or instrument to which the application relates, or of such a subsequent deed, as the case may be, and the same shall thereupon be enrolled accordingly at any time within six calendar months from the date of the order, and no acknowledgment shall be necessary prior to enrolment" (s. 2). **804.**

Force and effect given to deed, etc., by enrolment.

"Every enrolment made pursuant to an order of the Court under this Act shall, notwithstanding anything in the first-mentioned Act contained, have the same force and effect which by the second-mentioned Act, as explained and amended by the two subsequent Acts before mentioned, is given to the enrolment of a deed, assurance, or other instrument, or of a subsequent deed, by the three last-mentioned Acts respectively authorised to be enrolled, and duly enrolled according to the provisions thereof and within the time thereby respectively limited" (s. 3). **805.**

Proviso concerning deeds, etc., as to which at time of application to Court any action, etc., shall be pending.

"Provided always, that nothing herein contained shall affect or apply to any deed, instrument, or assurance as to which at the time of any such application to the Court of Chancery any action, suit, or proceeding shall be pending for setting aside the same or for asserting any right founded on the invalidity thereof, or any decree or judgment shall have been then already obtained founded on such invalidity" (s. 4). **806.**

Acknowledgment not to be necessary to enrolment.

By the stat. 31 & 32 Vict. c. 44, s. 3, "from and after the passing of this Act, it shall not be necessary to acknowledge any deed or instrument in order that the same may be enrolled in Her Majesty's High Court of Chancery." **807.**

Stat 35 & 36 Vict. c. 24, s. 13, as to enrolment where deeds have been lost or not duly enrolled.

By the stat. 35 & 36 Vict. c. 24, s. 13, it is enacted as follows :

"Whereas by an Act passed in the thirtieth year of the reign of Her present Majesty, chapter fifty-seven, intituled 'An Act to make further provisions for the enrolment of

Pr. II. T. 8.  
Ch. 2, s. 6.

certain deeds, assurances, and other instruments relating to charitable trusts,' provision was made for the enrolment, upon application by summons in a summary way to the Court of Chancery, and by order of the Court made upon such application, of certain deeds, assurances, and other instruments relating to charitable trusts, and it is expedient to extend such provision and to facilitate the enrolling of deeds, assurances, and instruments relating to charitable trusts where the original deeds creating such trusts have been lost, or when the same have not been enrolled in proper time: Be it enacted, from and after the passing of this Act, if the clerk of enrolments in Chancery for the time being shall be satisfied, by affidavit or otherwise, that the deed, assurance, or other instruments conveying or charging the hereditaments, estate, or interest for charitable uses was made really and bonâ fide for full and valuable consideration actually paid at or before the making or perfecting thereof, or reserved by way of rent-charge or other annual payment, or partly paid at or before the making or perfecting of such deed, assurance, or other instrument and partly reserved as aforesaid, without fraud or collusion, and that at the time of the application to the said clerk of enrolments possession or enjoyment is held under such deed, assurance, or other instrument, and that the omission to enrol the same in proper time has arisen from ignorance or inadvertence, or from the destruction thereof by time or accident, it shall be lawful for the said clerk of enrolments to enrol the deed, assurance, or instrument to which the application relates, or such a subsequent deed as in the said Act mentioned, as the case may be, and the same shall thereupon be enrolled according, and such enrolment shall be as valid and effective for all purposes as if the same had been made under the authority of the said last-mentioned Act. Over and above the ordinary fee payable upon the enrolment of any deed, assurance, or

Pr. 11. T. 8,  
Ch. 2, s. 5. other instrument, there shall be paid upon the enrolment under this section of any deed, assurance, or other instrument, the further fee of ten shillings." 808.

Stat. 33 & 34  
Vict. c. 34. By the stat. 33 & 34 Vict. c. 34 (passed 1st August, 1870), intituled, "An Act to amend the law as to the investment on real securities of trust funds held for public and charitable purposes," after reciting that it was expedient to amend the law relating to the investment on real securities of trust funds held for public and charitable purposes, it is enacted as follows :

Corporations and trustees holding money in trust for any public or charitable purpose may invest the same in real securities.

"It shall be lawful for all corporations and trustees in the United Kingdom holding moneys in trust for any public or charitable purpose to invest such moneys on any real security authorised by or consistent with the trusts on which such moneys are held, without being deemed thereby to have acquired or become possessed of any land within the meaning of the laws relating to mortmain, or of any prohibition or restraint against the holding of land by such corporations or trustees contained in any charter or Act of Parliament ; and no contract for or conveyance of any interest in land made bonâ fide for the purpose only of such security shall be deemed void by reason of any non-compliance with the conditions and solemnities required by an Act passed in the ninth year of King George the Second, intituled 'An Act to restrain the disposition of lands whereby the same become unalienable' " (s. 1). 809.

Proviso for cases in which the equity of redemption of the premises may be barred or released.

"Provided always, that in every case in which the equity of redemption of the premises comprised in any such security shall become liable to foreclosure, or otherwise barred or released, the same shall be thenceforth held in trust to be sold and converted into money, and shall be sold accordingly ; and if any decree shall be made in any suit for the purpose of redeeming or enforcing such security, such decree shall direct a sale (in default of

redemption) and not a foreclosure of such premises" Pr. II. T. 8, Ch. 2, s. 5.  
(s. 2). **810.**

"The words 'real security' in this Act shall include all mortgages or charges, legal or equitable, of or upon lands or hereditaments of any tenure, or of or upon any estate or interest therein or any charge or incumbrance thereon; and the word 'conveyance' shall include all grants, releases, transfers, assignments, appointments, assurances, orders, surrenders, and admissions whatsoever operating to pass or vest any estate or interest, at law or in equity, in the premises comprised in any real security" (s. 3). **811.**

Interpretation of terms.

[Also by stat. 36 & 37 Vict. c. 50, facilities were afforded for the conveyance of pieces of land not exceeding one acre, for sites for places of religious worship, and for burial places; and by stat. 45 & 46 Vict. c. 21 (a), the former Act has been extended to authorise, subject to certain specified restrictions, any corporation, ecclesiastical or lay, whether sole or aggregate, and any officers, justices of the peace, trustees, or commissioners holding land for public, ecclesiastical, parochial, charitable, or other purposes or objects, and also any limited owner seised or entitled only for life or lives, where the person next entitled for a beneficial interest in remainder, in fee simple or in fee tail is unborn or unascertained, to grant, convey, or enfranchise for the purposes of the former Act, such quantity of land as therein mentioned.] **811a.**

Stat. 36 & 37 Vict. c. 50. The Places of Worship Sites Act, 1873.

Stat. 45 & 46 Vict. c. 21. The Places of Worship Sites Amendment Act, 1882.

Conveyance of land by corporations, public bodies, and limited owners, for sites for places of worship, and burial places.

(a) See Appendix.

## CHAPTER III.

## OF INTERESTS BOTH LEGAL AND EQUITABLE.

PART II.  
T. 8, CH. 3.

Definition  
of an in-  
terest both  
legal and  
equitable.

When it  
arises.

Legal and  
equitable  
estates may  
co-exist,  
or may  
coalesce.

As already observed, an interest both legal and equitable is an interest in or ownership of real or personal property, which confers a right both to the possession and to the beneficial enjoyment of such property, as well at law as in equity. **812.**

This is the kind of ownership ordinarily created by common assurances, where no trust is declared, results, or arises. **813.**

As the legal and equitable estates may exist separately in different persons, so they may co-exist separately and distinctly in the same person, unless they are both co-extensive and of the same quality; in which case the equitable estate will merge in the legal estate, or rather will so coalesce with it as to cease to have any separate existence (*a*). **814.**

(*a*) See 2 Spence's Eq. Jur. 879, 880, and Smith's Executory Interests annexed to Fearn, § 50; 1

Cruise T. 12, c. 2, § 34, 35; Watk. Conv. 3rd ed. by Prest. 135.

## TITLE IX.

OF INTERESTS CLOTHED WITH THE OWNERSHIP, AND  
INTERESTS COLLATERAL TO THE OWNERSHIP.

INTERESTS, when considered in this relation, may be divided into these different species :

- I. Vested interests, or actual estates.
- II. Executory interests, or interests only, as distinguished from actual estates (a).
- III. Rights of entry or action.
- IV. Mere possibilities.
- V. Mere adverse possessions.
- VI. Expectancies.
- VII. Powers.
- VIII. Charges.
- IX. Liens. 815.

PART II.  
TITLE 9.

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Different kinds of interests, when considered in this relation.

(a) In the following chapter, an endeavour has been made to present to the reader, in a small compass, some of the leading principles of this most intricate and subtle subject of legal investigation, which is fully discussed in the writer's "Original View of Executory Interests in Real and Personal Property," forming the second volume of the tenth edition of Fearn. Notwithstanding modern enactments, this subject is still of the utmost practical importance. Multitudes of cases connected with it are sent to counsel; and hundreds are annually decided by the Courts, es-

pecially on short causedays, though comparatively few are reported. And in some of these cases, there have been as many as six different constructions contended for, by as many different parties.

The writer has generally referred to his own work on Executory Interests, annexed as a second volume to Fearn, rather than to Fearn; because the work of that most profound lawyer relates to real estate only, and because the subject of executory interests (other than contingent remainders) was in its infancy in Fearn's day.

## CHAPTER I.

## OF VESTED AND EXECUTORY INTERESTS (a).

## SECTION I.

*Of Vested and Executory Interests generally.*

Pr. II. T. 9,  
Ch. 1, s. 1.

Definition  
of a vested  
interest  
or actual  
estate.

Of a present  
vested  
interest or  
actual  
estate.

Of a future  
vested  
interest in  
lands or  
tenements.

Of a future  
vested  
interest in  
chattels.

Definition  
of an  
executory  
interest.

A VESTED interest, or an actual estate, is the entire ownership of which any subject of property is susceptible, or a portion thereof, actually acquired by and residing in the person who is said to have such vested interest or actual estate. And a present vested interest is the entire ownership of which any subject of property is susceptible, or the immediate portion thereof, actually acquired by and residing in the person who is said to have such present vested interest. Whereas, a future vested interest in lands or tenements, is a portion of the ownership thereof, next after a preceding vested interest for life, or in tail, and actually acquired by and residing in the person who is said to have such future vested interest. A future vested interest in chattels is a portion of the ownership thereof, next after a preceding vested interest, and actually acquired by and residing in the person who is said to have such future vested interest. 816.

An executory interest is the ownership, or a portion thereof, which remains to be had in any subject of property from a future time or event, and which is appointed by the terms of the instrument creating such executory

(a) The object of the author being only to present some of the leading principles on this subject, he must refer the reader, for the general law

connected with it, and for the cases, to the 10th edition of *Fearne, Jarman on Wills*, *Tudor's Lead. Cas. on Real Property*, and other text books.



interest to be acquired at that time or in that event by the person to whom such interest is limited. **817.**

Pr. II. T. 9,  
Ch. 1, s. 1.

And when the time or event is certain, the interest is a certain executory interest; when the time or event is contingent, the interest is a contingent executory interest. **818.**

Definition of a certain executory interest, and of a contingent executory interest.

When the right is a right of present possession, and the party is in possession, whether personally or by substitute, the estate is said to be vested in possession. When it is a present right of having the possession whenever it may become vacant by the determination of a preceding chattel interest, or whenever it may become vacant by the determination of a preceding freehold estate, or at some other future time to which only the possession, and not the ownership, is postponed: in each of these cases, the estate is said to be vested in right or interest (a). **819.**

When an estate is vested in possession.

When an estate is vested in right or interest.

I. Where an uncertain event forms part of the original description of a devisee or legatee, and not merely of a superadded description, the interest is necessarily contingent on account of the person; as where a gift is made "to the children who shall be living" at a particular time, and not to the children or the survivors, "or to the children or such of them as shall be living" (b). **820.**

Rules for determining whether an interest is vested or executory.

II. Where a devise or bequest is made to a person "when" or "as soon" as he shall attain a given age, or when or as soon as an event shall happen which may never occur at all, or "at," or "upon," or "from and after" his attaining such age or the happening of such event, whether the words of contingency precede or follow the words of gift, the gift is contingent, unless there are indications of immediate vesting (c). **821.**

But the gift is vested—

1. If the testator does not annex the time to the devise

(a) Smith's Executory Interests annexed to Fearn. § 79, 80. Wills, 2nd ed. 726.

(c) See Smith's Ex. Int. § 285.

(b) See Id. § 281—4; 1 Jarm.

PR. II. T. 9.  
CH. 1, s. 1.

or bequest itself, but merely to the payment, possession, or enjoyment: as where he gives A. a legacy, to be paid when he shall attain the age of twenty-one years. This distinction, however, does not apply to charges on real estate or where the period may never arrive, unless it is the attainment of a given age (*a*). 822.

2. Where the event is the attainment of a certain age, or where, in the case of a residuary bequest, the event is that of marriage, unless it is with consent, and the testator gives the whole of the intermediate income of real estate, or of personal estate not arising from a charge on real estate (whether such personal estate consist of pure personalty or of money to arise from the absolute conversion of real estate), to the person to whom he devises or bequeaths such real or personal estate, and the attainment of such age or the marriage does not form part of the original description of the devisee or legatee, and there is no limitation over in case of the death of the party under that age or without having been married (*b*). 823.

3. Where executors are empowered to make advances out of the respective portions of children to whom a residuary bequest is made on their attaining a certain age, without any limitation over (*c*). 824.

4. Where the postponement to a certain age, or to a future period which is sure to arrive, is not part of the original description of the devisee or legatee, and seems merely to arise from the circumstances of the estate, or appears to be for the accomplishment of some special purpose unconnected with a suspension of the property or ownership; such as payment of debts, improvements, the

(*a*) See Smith's Executory Interests annexed to Fearn, § 310—327, 342—3; 1 Jarm. Wills, 2nd ed. 712—714.

(*b*) See Smith's Ex. Int. § 238—

339, 341, 368; 1 Jarm. Wills, 2nd ed. 717—719; *In re Hart's Trusts*, 3 D. & J. 195. But see 1 Rep. Leg. by White, 581.

(*c*) Smith's Ex. Int. § 340.

better management of the property, or the convenience of a prior taker (a). **825.**

Pr. II. T. 9,  
Ch. 1, s. 1.

5. Where a bequest is made to children when they shall attain a certain age, and the testator appoints a trustee for them during the intermediate time (b). **826.**

6. In two cases, one of which was decided by the House of Lords, where a devise was made to a person when he should attain twenty-one, or at twenty-one, it was held that he took a vested interest in consequence of there being a limitation over in the opposite event. But these decisions seem entirely wrong (c). **827.**

III. Where a *bequest* is made to a person, "if" or "in case" or "provided" he shall attain a given age, whether the conditional expressions precede or follow the gift, there, inasmuch as the words "if," "in case," "provided," properly import contingency, the bequest will be contingent, notwithstanding the disannexing of the period from the gift or the existence of a prior devise or bequest (d). **828.**

IV. And so where a *devise* is made to a person, "if" or "in case" or "provided" he shall attain a given age, and the conditional expressions *precede* the gift, the devise will be contingent (e). **829.**

V. But where, in a *devise* the word "provided" *follows* the words of gift, and there is no limitation over, it generally imports a condition subsequent, instead of a condition precedent suspending the vesting of the estate. Where a devise is made to a person provided he lives to attain a certain age, and the words "provided," etc., *follow* the words of gift, and there is a limitation over in the opposite event, the word "provided" imports a special or collateral

(a) See Smith's Executory Interests annexed to Fearn, § 340 a; 1 Jarm. Wills, 2nd ed. 715.

(b) Smith's Ex. Int. § 345.

(c) Id. § 351—366.

(d) Id. § 290—3, 344; 1 Rep. Leg. by White, 567—8.

(e) Smith's Ex. Int. § 296—7, 344.

Pr. II. T. 9,  
Ch. 1, s. 1.

limitation. And where, in a devise, the words "if" or "in case" he shall attain a certain age, follow the words of gift, the conditional expressions import a special or collateral limitation (a). **830.**

VI. Where the interest would be an executory interest, if the event to which the devise has reference were uncertain, it will be equally executory if the devise has reference to a time or event which is sure to occur. The only difference is, that, in the former case, the interest is a contingent executory interest; whereas, in the latter, it is a certain executory interest (b). **831.**

VII. Such words as "when," "then," "after," "as soon as," and even the word "if," or the words "in case," though apparently amounting to a condition precedent, which must be performed before a remainder or quasi remainder can become a vested interest, have no other force than to point out the time when the remainder or quasi remainder is to be clothed with the possession or enjoyment, in cases where the condition to which they refer would have been necessarily implied without them by the words which usually introduce a vested remainder (c). **832.**

## SECTION II.

### *Of Remainders and Quasi Remainders.*

Pr. II. T. 9,  
Ch. 1, s. 2.

Lax sense  
of the term  
remainder.

Definition of  
a remainder  
properly so  
called.

The term remainder is sometimes used in a lax sense, to denote any kind of subsequent interest, or the limitation thereof. But "a remainder, strictly so called, is an estate or interest in lands or tenements, which is limited, either directly or indirectly, to take effect in possession,

(a) See Smith's Executory Interests annexed to Fearn, § 296—8, 351, 351 a; supra, par. 152—171.

(b) See Smith's Executory Interests annexed to Fearn, § 301.

(c) Id. § 346.

or in enjoyment, or in both, subject only to any term of years or contingent interest that may intervene, immediately after the regular expiration of a particular estate or freehold previously created together with it, by the same instrument, out of the same subject of property" (a). 833.

Pr. II. T. 9.  
Ch. 1, a. 2.

"A remainder, as the word itself imports, is always limited after a particular estate. And any preceding estate for life or in tail is termed a particular estate; but the term is not applied to any estate in fee, however restricted. Hence, no estate can be limited by way of remainder on the regular expiration of a fee, even though it may be only a qualified fee which cannot last longer than an estate tail. So that if an estate is limited, even by way of use or devise, to A. and his heirs, while B. or any issue of his body shall be in existence; and after the decease of B. and failure of his issue, to C. and his heirs; or if an estate is limited, even by way of use or devise, to A. and his heirs, while he and his heirs shall continue lords of the manor of Dale; and if A. and his heirs shall cease to be lords of the manor of Dale, to C. and his heirs; the latter limitation, in each case, is void;" for fees of this qualified kind may endure for ever, so that there can be no remainder after them, but only a possibility of reverter (b). 834.

After what  
estate a  
remainder  
may be  
limited.

"An interest of freehold duration, which is limited after, and only preceded by, a term for years, may be designated a remainder in relation to the prior term for years, so far as regards the possession or beneficial interest" (c). But such an interest is not a remainder as regards the seisin or ownership. For, "as in the case supposed, there is no other preceding interest than a term

In what  
sense a  
freehold  
after a term  
may be  
called a  
remainder.

(a) See Smith's Executory Interests annexed to Fearn, § 159; see also § 159 a—164.

(b) Co. Litt. 18 a; Watk. Conv.

3rd ed. by Prest. 76; Smith's Executory Interests annexed to Fearn, § 165.

(c) Id. § 245.

Pr. II. T. 9.  
Ch. 1, s. 2.

for years; and as a term for years is a mere right extending to the possession, with or without the exclusive beneficial interest, and not a portion of the seisin, property, or ownership; it follows that the freehold interest cannot be said to be a remainder, remnant, residue, or remaining portion of the seisin, property, or ownership" (a). 835.

Where a  
freehold  
after a term  
is a present  
vested  
interest,  
subject to  
a term.

"If a freehold interest is limited to a person in being and ascertained, to take effect on the certain regular expiration of a term for years, in possession, without being preceded by any other freehold interest, such freehold interest is a present vested interest, subject to the term, as regards the possession, with or without the exclusive beneficial interest" (b). And in other cases where a freehold interest is limited after, and is only preceded by, a term of years, it is not a remainder, though it may be good as a springing interest by way of use or devise (c). 836.

Cross  
remainders

Where lands are given in undivided shares to two or more persons for particular estates, so that upon the determination of the particular estates in any of those shares they remain over to the other grantees, and the remainderman or reversioner is not let in till the determination of all the particular estates, there the grantees take their original shares as tenants in common, and the remainders limited among them on the failure of the particular estates are called cross remainders. They cannot be created by mere implication in the case of legal limitations in a deed (d). And it has been said that in a deed, it is not enough expressly to declare an intention to create them, but they can only be created by express limitations (e). 837.

in a deed.

(a) See Smith's Executory Interests annexed to Fearn, § 246.

(b) Id. § 248.

(c) Id. Part II. c. 4, passim.

(d) 4 Cruise T. 32, c. 21, § 59, 60;

Co. Litt. 195 b, n. (1); 2 Jarm. Wills, 2nd ed. 456; *Edwards v. Alleston*, 4 Russ. 78.

(e) See Co. Litt. 195 b, n. (1); *Doe d. Faggett v. Worsley*, 1 East

Cross remainders may arise in a will by necessary implication; as where tenements are devised to two persons severally in tail, or the same tenement is devised to two as tenants in common in tail, and upon failure of their issue to a third person, with an apparent intention that he should take the entirety altogether or none at all (*a*). Where cross remainders are to be raised by implication between two persons only, the presumption is in favour of cross remainders; where they are to be raised between more than two, the presumption is against them, except as between several members of the same family. But such presumption may be rebutted, in each case, by circumstances of plain intention (*b*). **838.**

Pr. II. T. 9,  
Ch. 1, s. 2.

Cross  
remainders  
in a will.

A quasi remainder, or a remainder in personal property, is an interest in chattels real or personal, limited as a legal or equitable interest by will, or as an equitable interest by deed by way of trust, to take effect in possession, or in enjoyment, or in both, immediately after the regular expiration of another interest created together with it, by the same instrument, out of the same subject of property. **839.**

Definition  
of a quasi  
remainder.

It cannot be limited, as a legal interest, by deed at common law; because at the common law it was considered that there could be no remainder in personal property, on account of the original shortness of terms for years and their liability to destruction by certain legal means, and on account of the liability of chattels personal to destruction and loss in various ways. So that if a term of years is granted to A. for life, and after his death to B., the whole term belongs to A. (*c*). Nor can a quasi remainder

A quasi  
remainder  
cannot be  
limited as  
a legal  
interest  
by deed.

430, 431; *Doe d. Clift v. Birkhead*,  
4 Exch. 124—5.

(*a*) 6 Cruise T. 38, c. 15, §  
26—30; Burton, § 668; see 2  
Jarm. Wills, 2nd ed. 456, 458,  
471—2.

(*b*) 6 Cruise T. 38, c. 15, § 44;  
Burton, § 669, 670; but see 2 Jarm.  
Wills, 2nd ed. 458, 471—2.

(*c*) See Smith's Executory Inter-  
ests annexed to Fearn, § 168—168  
b; 1 Pres. Shep. T. 116.

Pr. II. T. 9.  
Ch. 1, s. 2. in personal property be limited as a legal interest by deed by way of use; because the Statute of Uses does not execute a use of personal property. 840.

Limitation  
over of  
consumable  
articles.

A bequest of consumable articles to a person for life, or so long as such person shall remain unmarried, is a gift of the absolute interest; and a limitation over intended to take effect as a quasi remainder is void, even though such person die or marry in the testator's lifetime (a). But farming stock and implements of husbandry do not fall within this rule, as things quæ ipso usu consumuntur (b). 841.

Definition  
of vested  
and con-  
tingent  
remainders  
and quasi  
remainders.

Remainders, or quasi remainders, are either vested or contingent. A vested remainder or quasi remainder is a portion of ownership which is next after a preceding portion of ownership and actually acquired by and residing in the person who is said to have such vested remainder or quasi remainder. A contingent remainder or quasi remainder is a portion of ownership which is next after a preceding portion of ownership, and is not yet acquired by the person who is said to have such contingent remainder or quasi remainder, but is appointed by the terms of the grant, devise, or bequest to be acquired by and to reside in him, though only in a contingent event. Or, if defined with reference to the right of possession or enjoyment, a vested remainder or quasi remainder is "one that is so limited to a person in being and ascertained, that (subject to any such chattel or other interest collateral to the seisin, property, or ownership, as extends to the possession or enjoyment) it is capable of taking effect, in possession or enjoyment, on the certain determination of the particular estate, without requiring the concurrence of any collateral contingency." A contingent remainder or quasi remainder "is one that is so

(a) *Andrew v. Andrew*, 1 Coll. 690.

(b) *Groves v. Wright*, 2 K. & J. 847.



limited as not to be capable of taking effect in possession or enjoyment, on the certain determination of the particular estate, without the concurrence of some collateral contingency" (a). **842.**

Pr. 11. T. 9,  
Ch. 1, s. 2.

There are four kinds of contingent remainders:—

Four kinds  
of con-  
tingent  
remainders.

1. "Where the remainder depends entirely on a contingent determination of the preceding estate itself: as if A. makes a feoffment to the use of B. till C. returns from Rome, and after such return of C., then to remain over in fee." **843.**

2. "Where the contingency on which the remainder is to take effect is independent of the determination of the preceding estate: as if a lease be made to A. for life, remainder to B. for life, and if B. die before A., remainder to C. for life" (b). **844.**

3. "Where a remainder is limited to take effect on an event, which, though sure to happen some time or other, yet may not happen till after the determination of the particular estate: as if a lease be made to J. S. for life, and after the death of J. D., the lands to remain over to another in fee." **845.**

4. "Where a remainder is limited to a person not ascertained, or not in being, at the time when such limitation is made": as if a lease be made to one for life, remainder to the right heirs of J. S., who is living; or remainder to the first son of B., who has no son then born; or if an estate be limited to two for life, remainder to the survivor of them in fee (c). **846.**

"A remainder after an estate tail may seem to be a contingent remainder of the first kind. But a failure of issue, though it may not happen till a very distant period, and though it is entirely uncertain when it will happen, is con-

Remainder  
after an  
estate tail

(a) Smith's Executory Interests annexed to Fearn, § 173, 174; see also § 177—182.

(b) *Price v. Hall*, L. R. 5 Eq. 399.

(c) Fearn, 5—9.

Pr. II. T. 9.  
Ch. 1, s. 2.

sidered certain to happen some time or other. And hence a remainder limited on an estate tail, without reference to a failure of issue at any particular time, and without requiring the concurrence of any collateral contingency, does not fall within the definition of, and therefore is not an exception from, the first kind of contingent remainders, but is strictly and properly a vested remainder." 847.

The usual  
limitation  
to trustees  
to preserve  
contingent  
remainders.

The usual limitation to trustees to preserve contingent remainders is an exception from the first kind of contingent remainders. In *Smith d. Dormer v. Parkhurst* (a), it was held to be a vested remainder; a decision which was only defensible on the ground of necessity, in order to avoid overturning thousands of settlements (b). 848.

Instances  
where  
limitations  
to the heirs  
or heirs of  
the body  
do not  
create con-  
tingent  
remainders.

The person who will be heir or heir of the body, even if in being, is unascertained till the death of the ancestor. And hence remainders to the heirs, or heirs of the body, of a living person, are contingent remainders, except where the word heirs, or the words heirs of the body, is or are used, not in the technical sense, but for "sons, daughters, or children," or for heir or heirs apparent or presumptive, or where a limitation made to the heirs of the grantor, before the stat. 3 & 4 Will. 4, c. 106, was wholly inoperative (c), or where the rule in *Shelley's case* creates an exception (d). 849.

Time for  
vesting of  
remainders.

Except so far as the law is altered by the stat. 8 & 9 Vict. c. 106, s. 8, and by the stat. 40 & 41 Vict. c. 33 (Appendix) (e), "a contingent remainder cannot vest at all, unless it vests during the existence of a previous estate of freehold, or at least at the very instant of the determination of the sole or last subsisting previous

(a) 18 Vin. 413; 4 Bro. Cas. Parl. 353.

(b) See *Smith's Executory Interests* annexed to *Fearne*, Part II. c. 5.

(c) *Infra*, Part III. Tit. 1, Ch. 1, s. 2.

(d) *Supra*, par. 403, 404.

(e) See *infra*, par. 854, 858 a.

estate of freehold" (a). But it is to be observed, that by a decision of the House of Lords, and by the stat. 10 & 11 Will. 3, c. 16, under a limitation in remainder, a posthumous child may take in the same manner as if born in the father's lifetime (b). 850.

Pr. II. T. 9,  
Ch. I, s. 2.

By the old law, "a contingent remainder of the measure of freehold, unless the legal estate was in trustees, must have been supported by a previous vested freehold estate; that is, it must have been originally preceded by a vested interest, of the measure of freehold, which was capable, in its original limitation, of enduring till the vesting of the remainder; otherwise it was void *ab initio*: and one such previous estate of freehold must have actually endured until that period" (c). 851.

Support  
of con-  
tingent  
remainders.

Hence, by the old law, "whenever the legal estate was not in trustees, and there was, in the first instance, or there happened to be, eventually, but one preceding estate of freehold duration, and that estate was determined, so as not even to exist as a right of entry, before the event happened on which a contingent remainder was to vest, such remainder was necessarily destroyed." And it would never afterwards arise, even though the particular estate were subsequently restored. 852.

Destruction  
of contin-  
gent re-  
mainders  
created out  
of a legal  
fee in  
heredita-  
ments of  
freehold  
tenure.

The preceding estate might be determined, so as to cause the destruction of a contingent remainder limited thereon, whether at common law or otherwise, in various ways (d): 1. "By regular expiration. 2. By disseisin and tolling of the right of entry. 3. By the destructive operation of a feoffment, fine, or recovery, by the tenant of the

(a) Smith's Executory Interests annexed to Fearn, § 702; see also § 703—704; *Price v. Hall*, L. R. 5 Eq. 399.

(b) 2 Cruise T. 16, c. 4, § 11—16.

(c) Smith's Executory Interests

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annexed to Fearn, § 757; for an elucidation of this, see *Id.* Part III. c. 8.

(d) Smith's Executory Interests annexed to Fearn, § 766, 767: see also § 783.

Pr. II. T. 9, preceding estate, whether he was beneficially entitled or  
 Ch. 1 s. 2. not. 4. By forfeiture. 5. By merger" (a). 853.

Stat. 7 & 8  
 Vict. c. 76,  
 n. 8.

By the stat. 7 & 8 Vict. c. 76, s. 8, it was enacted, "that after the time at which this Act shall come into operation no estate in land shall be created by way of contingent remainder; but every estate which before that time would have taken effect as a contingent remainder shall take effect (if in a will or codicil) as an executory devise, and (if in a deed) as an executory estate of the same nature and having the same properties as an executory devise; and contingent remainders existing under deeds, wills, or instruments executed or made before the time when this Act shall come into operation shall not fail, or be destroyed or barred, merely by reason of the destruction or merger of any preceding estate, or its determination by any other means than the natural effluxion of the time of such preceding estate, or some event on which it was in its creation limited to determine." But by the stat. 8 & 9

Stat. 8 & 9  
 Vict. c. 106,  
 ss. 1, 8.

Vict. c. 106, s. 1, this enactment was very properly repealed as from the time of the taking effect thereof, and by s. 8, contingent remainders are protected against destruction by forfeiture, surrender, or merger of the particular estate. The words are these: "That a contingent remainder, existing at any time after the 31st day of December, 1844, shall be, and, if created before the passing of this Act, shall be deemed to have been, capable of taking effect, notwithstanding the determination, by forfeiture, surrender, or merger of any preceding estate of freehold, in the same manner, in all respects, as if such determination had not happened." 854.

Contingent  
 remainders  
 protected as  
 from 31st  
 December,  
 1844, against  
 the prema-  
 ture failure  
 of a preced-  
 ing estate.

Destruction  
 of con-  
 tingent  
 remainders  
 created out  
 of an equita-  
 ble fee.

"There is no necessity for the continuance of a pre-  
 ceding particular estate of freehold to preserve contingent  
 remainders, where the legal estate in fee is vested in  
 trustees: for, the legal estate of the trustees will be suffi-

(a) See Smith's Ex. Int. Part III. c. 9, § 1, 2.

cient to preserve the contingent remainders, notwithstanding the regular expiration of the particular estate before the contingent remainder can vest" (a). **855.**

Pr. II. T. 9  
Ch. 1, s. 2.

The same protection arises where the legal fee is outstanding in mortgagees (b). **855a.**

Limitations which would otherwise be construed to be legal limitations, will not be construed to be equitable limitations, merely because, in the events that have happened, the remainders are left without support (c). **856.**

Limitations  
not con-  
strued  
equitable to  
support  
them.

Where a preceding estate or interest is void, the remainder or quasi remainder, if vested, is accelerated (d). **857.**

Accelera-  
tion.

And in the case of hereditaments of copyhold tenure, "where the preceding estate is determined by the act of the tenant, as by surrender to the lord or to another person, or acceptance of the reversion, or forfeiture, and would not have expired, by original limitation, before the vesting of the contingent remainder, such remainder is supported by the ordinary freehold in the lord." "If, however, the freehold of inheritance in the lord of a manor becomes united with a particular estate of copyhold, by a deed of enfranchisement, the contingent remainders expectant upon such particular estate are thereby destroyed" (e). **858.**

Destruction  
of con-  
tingent  
remainders  
created out  
of a legal fee  
in copy-  
holds.

[Now, however, by stat. 40 & 41 Vict. c. 33 (Appendix), which passed the 2nd of August, 1877, it is enacted as follows: "1. Every contingent remainder created by any instrument executed after the passing of this Act, or by any will or codicil revived or republished by any will or codicil executed after that date, in tenements or heredita-

Stat. 40 & 41  
Vict. c. 33.  
Cases  
in which  
contingent  
remainders  
capable of  
taking  
effect.

(a) Smith's Executory Interests annexed to Fearn, § 783; *Abbis v. Burney, In re Finch*, L. R. 17 Ch. D. (Ap.) 211.

(b) *Astley v. Micklethwait*, L. R. 15 Ch. D. 59.

(c) *Ouncliffe v. Brancher*, L. R. 3 Ch. D. (Ap.) 393, 407.

(d) *Jull v. Jacobs*, L. R. 3 Ch. D. 708.

(e) Smith's Executory Interests annexed to Fearn, § 786—788.

Pr. II. T. 9,  
Ch. 1, s. 2.

ments of any tenure, which would have been valid as a springing or shifting use or executory devise or other limitation had it not had a sufficient estate to support it as a contingent remainder, shall, in the event of the particular estate determining before the contingent remainder vests, be capable of taking effect in all respects as if the contingent remainder had originally been created as a springing or shifting use or executory devise or other executory limitation." This section constitutes the whole Act.] **858a.**

### SECTION III.

#### *Of Reversions.*

Pr. II. T. 9,  
Ch. 1, s. 3.

Definition of  
a reversion.

Reason of  
the term.

A reversion is that portion of ownership, which, on the creation of a partial interest only, remains undisposed of, and therefore vested in the person by whom such partial interest is created. And it is so called, because, on the expiration of such partial interest, the possession of the land or other thing, which is the subject of such interest, reverts to the person or the representatives of the person who created the partial interest (a). **859.**

The whole or a part of this reversion or undisposed-of portion of ownership may be made the subject of a disposition by a subsequent instrument. **860.**

Succession  
duty on sale  
of a re-  
version.

[On the sale of a reversion the purchaser must, in the absence of a special stipulation to the contrary, either covenant to pay the succession duty and to indemnify the vendor against it, or compound for it in advance (b).] **860a.**

When a  
reversion, or  
an interest  
created out  
of it, is  
vested and

A reversion, which remains undisposed of, is always vested (c); and so a reversion, or the immediate part of it, when simply transferred, is always vested; but a con-

(a) See 2 Bl. Com. 175; 2 Cruise T. 17, § 1—3; Watk. Conv. 3rd ed. by Prest, 108.

(b) *Cooper v. Trenby*, 28 Beav. 194.

(c) See 2 Cruise T. 17, § 13.

tingent interest may be created out of a reversion. And where a future interest is of such a nature, that, if it had been limited by the same instrument by which a preceding partial interest was created, it would have been a vested remainder expectant on such preceding interest, it will, if limited by a subsequent instrument, constitute the reversion, or the immediate part of the reversion, expectant on such preceding interest, and will be a vested interest. But where a future interest is of such a nature, that, if it had been limited by the same instrument by which a preceding partial interest was created, it would have been a contingent remainder or other executory interest, it will, if limited by a subsequent instrument, be an executory interest of some kind other than a contingent remainder, in relation to such preceding interest (a). Hence, when the whole of the reversion, or that part of it which immediately adjoins a partial interest previously created, is made the subject of disposition by a subsequent instrument, and limited to take effect in possession (subject only, in the case of real estate, to any term of years or contingent interest that may intervene) simply on the regular expiration of the partial interest previously created, such limitation passes a vested interest. But a limitation of the whole or of a part of such undisposed-of portion of ownership in any other way passes only an executory interest; as for instance, where the subsequent disposition of the whole of such undisposed-of portion of ownership is made to depend on a contingency unconnected with the expiration of the partial interest previously created, or where the subsequent disposition affects only that part of such undisposed-of portion of ownership, which remains to be had from and after a time subsequent to the expiration of the partial interest previously created. **861.**

Pr. II. T. 9.  
Ch. 1, s. 3.

when  
contingent.

(a) In connection with these distinctions on the subject of reversions see Smith's Executory Interests annexed to Fearn, Part II. c. 9.

Pr. II. T. 9,  
Ch. 1, s. 3.

No reversion  
on a  
qualified  
fee.

Reversion  
forming  
part of a  
particular  
estate.

Reversion  
on an estate  
for years.

Where a gift is made of a qualified or base fee, no reversion remains in the donor (*a*), but only a possibility of reverter. **862.**

Where a person having only a particular estate in lands, grants a smaller estate than his own, he has a reversion left in himself (*b*). **863.**

Where a person creates an estate for years, by demise at common law, he has a reversion as soon as the lessee enters, and not before. But when an estate for years is created by a conveyance deriving its effect from the Statute of Uses, the person to whom such estate is limited acquires the actual possession without entry; and consequently the person who creates the estate for years has a reversion immediately upon the execution of the conveyance (*c*). **864.**

Rent  
incident to  
a reversion.

Rent reserved is incident to the reversion, though not inseparably so. By special words, the reversion may be granted away, reserving the rent. But by a general grant of the reversion, the rent will pass with it as incident thereunto; for the incident passes by the grant of the principal: *accessorium sequitur suum principale* (*d*). **865.**

#### SECTION IV.

##### *Of Executory Interests other than Contingent Remainders or Quasi Remainders.*

Pr. II. T. 9,  
Ch. 1, s. 4.

Contingent remainders are executory interests, as opposed to vested interests. But the term executory interests is generally used to denote such executory interests as are not limited by way of remainder. Of such executory interests there are several kinds, to which it is convenient,

(*a*) 2 Cruise T. 17, § 6.

(*b*) *Id.* § 8.

(*c*) *Id.* § 7.

(*d*) 2 Bl. Com. 176.



and indeed necessary, if we would avoid confusion of ideas, to assign distinct specific names, even where it has not been usual to do so. **866.**

Pr. II. T. 9  
Ch. 1, s. 4.

One kind is a description of interest, which, when created by way of use, has been termed a springing use, and which may therefore be conveniently termed a springing interest, as that term will include such interests when created by way of devise, as well as those which are created by way of use in a deed. **867.**

Springing  
interests.

"A springing interest in real estate is an interest by way of use or devise, to take effect at a future time, without being supported by, and without affecting, any other interest of the measure of freehold" (a). Of these interests, there are several species (b). **868.**

But they are all created by way of use or devise. They would be void if inserted in a deed at common law. For, at the common law an estate of freehold in corporeal hereditaments could not be made to commence in futuro, otherwise than in remainder immediately after the regular expiration of another estate of freehold in possession; because the law was anxious that it should always be matter of notoriety who was the owner of the land, that the lord might be certain on whom he was to call for the services due for the estate; and that, if the rightful claimant were excluded, he might know against whom to bring his action, which could only be against the tenant of the freehold for the time being (c). Although when they are by way of use, they are sometimes termed springing uses, yet when they are by devise, they are usually designated by the generic name of executory devises (d). **869.**

(a) See Smith's Executory Interests annexed to Fearn, § 117.

(b) See Id. § 118—127.

(c) Burton, § 22; 1 Pres. Shep. T. 212; 4 Cruise T. 32, c. 4, § 5, 6;

Watk. Conv. 3rd ed. by Prest. 31—3, 73, 91, 92, 94; Co. Litt. 217 a.

(d) Smith's Executory Interests annexed to Fearn, § 127 a.

Pr. II. T. 9,  
Ch. 1, s. 4.

A springing interest in personal estate is an interest by way of bequest or of trust, to take effect at a future time, without being preceded by, and without affecting any other interest. Limitations of this kind, by way of bequest, are usually designated by the generic name of executory bequests (a). 870.

Alternative  
interests.

Another kind of executory interest is what may be termed an alternative interest. This is an "interest that is only to vest in case the next preceding interest should never vest in any way, through the failure of the contingency on which such preceding interest depends. As where a testator devises to A. for life; and if he have issue male, then to such issue male and his heirs for ever; and if he die without issue male, then to B. and his heirs for ever: or, where a testator bequeaths personal estate to the first son of A., and if A. should have no son, then to B." (b). 871.

These interests "considered in conjunction with those for which they are substitutionary, are sometimes termed contingencies with a double aspect" (c). 872.

"But a limitation which is simply an alternative limitation, will be allowed to take effect, if, in any way, the next preceding limitation fails to take any effect, even though the precise event on which such alternative limitation is to take effect never happens" (d). 873.

Interests  
under  
augmenta-  
tive limita-  
tions.

Another kind of executory interest is what may be termed (for want of any other specific term), an interest augmented in a given event, or an interest under an augmentative limitation or under a limitation causing "an enlargement of an estate upon a condition." This is an interest arising by deed at common law, under which a term for years previously created in things that, under the

(a) Smith's Ex. Int. § 127 b.

(b) Id. § 128.

(c) Id. § 129.

(d) Smith's Ex. Int. § 694. On the subject of alternative limitations, see also Id. Part II. c. 21, 22, 24.

old law, lay in livery, or a term for years in things that lay in grant, or a preceding estate for life or in tail, created by the instrument containing such limitation, is, in a given event to be absorbed by, or transmuted into, a larger estate of the same quality, in case such preceding estate remains unaliened, and unchanged in quality, till the fulfilment of the condition (a). **874.**

Pr. II. T. 9,  
Ch. 1, s. 4.

Another kind is what may be termed (for want of any other specific term) an interest diminished in a given event, or an interest under a diminuent limitation. This is an interest under "a clause by which it is provided whether in a deed at common law or by way of use or devise, that, in a particular event, an interest previously given by the same instrument shall be transmuted into one of a lower denomination. As where a man makes a lease for life, and if the lessee within one year pay not 20*l.* that he shall have but a term for two years" (b). **875.**

Interests  
under  
diminuent  
limitations.

Another kind of executory interest is an interest under a conditional limitation (c). **876.**

Interests  
under  
conditional  
limitations.

The term executory devise, bequest, or limitation, when used in contradistinction, as it generally is, not only in a generic sense, to immediate devises, bequests, or limitations, but also in a specific sense, to such executory limitations as are by way of contingent remainder, denotes "such a limitation of a future estate or interest in lands or chattels as the law admits in the case of a will, though contrary to the rules of limitation in conveyances at common law," or, in other words, it denotes limitations of springing interests, limitations of interests by way of conditional limitation, and quasi remainders after a life interest in personal estate; as distinguished from those limitations of future interests which were good limitations at common law; namely, limitations by way of remainder,

Senses of  
the term  
executory  
devise,  
bequest, or  
limitation.

(a) Smith's Executory Interests,  
§ 137; see also § 138—146.

(b) Id. § 147.

(c) See *supra*, par. 168—171.

Pr. II. T. 9,  
Ch. 1, s. 4. limitations of the whole or the immediate part of a reversion, augmentative limitations, and diminuent limitations. An alternative limitation, though always an executory devise in the generic sense of the term, as opposed to an immediate devise, is not always an executory devise in the specific and usual sense, in contradistinction to a contingent remainder; for many alternative limitations are contingent remainders in relation to the particular estate" (a). 877.

### SECTION V.

#### *Certain other Points connected with the subject of Vested and Executory Interests.*

Pr. II. T. 9,  
Ch. 1, s. 5. Limitations may operate in different characters, that is, as remainders, or as alternative limitations, or as conditional limitations, in regard to another limitation, in different events (b), or in regard to different limitations (c), or, in regard to different portions of property (d). 878.

Same  
limitation  
operating  
in different  
characters.

Limitation  
a remainder  
rather than  
an ex-  
ecutory  
limitation  
of another  
kind.

"It is a general rule, that a limitation shall, if possible, be construed to be a remainder, rather than an executory devise. Or, to express the rule more precisely, and in its true extent, a limitation, whether by deed or devise, shall if it possibly can, consistently with other rules of law, be construed to be a remainder rather than an executory limitation not by way of remainder" (e). 879.

Interests  
vested  
rather than  
contingent.

It is also a general rule, that "an interest shall be construed to be vested, rather than contingent. Or (to express the rule more precisely) in doubtful cases an interest shall, if it possibly can, consistently with other

(a) Smith's Executory Interests annexed to Fearn, § 111 a; see also 111 b, 111 c.

(b) Id. Part I. c. 24.

(c) Id. Part II. c. 25.

(d) Id. Part II. c. 26.

(e) Smith's Ex. Int. § 196—7;

Watk. Conv. 3rd. ed. by Prest. 99; *Brackentbury v. Gibbons*, L. R. 2 Ch. D. 417, 419; *In re Lechmere and Lloyd*, L. R. 18 Ch. D. 524, 529. For the reasons of this, see Smith's Ex. Int. § 198—9.

rules of law, be construed to be vested in the first instance, rather than contingent ; but if it cannot be construed as vested in the first instance, it shall be construed to become vested as early as possible" (a). 880.

Pr. II. T. 9,  
Ch. 1, s. 6.

Thus, where, by an ultimate or subsequent limitation, a testator devises or bequeaths to his own heir or heirs or next of kin, or the persons entitled to his personalty under the Statute of Distributions, the devise or bequest creates a vested interest in favour of the person or persons answering that description at the death of the testator, rather than at the time when such limitation takes effect, unless there is some indication of a contrary intention. And where, by an ultimate or subsequent limitation, a testator devises or bequeaths to the heir or heirs, or next of kin of another person, the interest devised or bequeathed vests in the person or persons answering that description at the death of such person, if he survives the testator, or at the death of the testator, if he predeceases the testator, rather than at the time when such limitation takes effect, unless there is some indication of a contrary intention. And the mere circumstance of the person so answering the description, in these cases, being the object of a prior limitation in the same will, is not of itself a sufficient indication of such a contrary intention. So that it was even held, that under an ultimate trust "to assign personal estate unto and equally between the testator's next of kin," his two children were entitled as his next of kin at his death, although they were the objects of the prior trusts and died in infancy, and although the ultimate trust was only to take effect if all his children should die, and without leaving issue. For where, after specific limitations, a testator gives his property to his next of kin, much weight

Limitations  
to heirs,  
next of kin  
or persons  
entitled  
under the  
Statute of  
Distribu-  
tions.

(a) Smith's Ex. Int. § 200—1. rule, see also 1 Jarm. Wills, 2nd ed.  
For the reasons of this rule, see Id. 683, 699 ; 2 Id. 69.  
§ 202—209. And as to the same

Pr. II.  
Ch. 1, s. 5.

is not to be attached to that which is supposed to be the testator's intention in favour of or against particular persons as his next of kin, as infinite variations may take place in that class between his will and his death (a).

Limitations  
apparently  
dependent  
on surviving  
parents.

Again, although a portion or legacy may seem *prima facie* to depend upon the person interested surviving his parents, yet there is the strongest leaning against this construction, especially in the case of a marriage settlement. So that if it is possible to satisfy the words by putting a different construction upon them, the Court will generally do so. And hence, in the case of the expression "die before their shares shall become payable," the leaning is to construe "payable" as meaning "vested," unless the plain meaning of the passage and context will not admit of it (b). So a condition precedent annexed to a preceding interest will not be applied to a subsequent interest, where it does not necessarily extend to it (c). 881.

Condition  
annexed to  
a preceding  
interest.

Rule against  
perpetuities.

Executory interests, other than those in remainder after or engrafted on an estate tail, must be so limited, that,

(a) 2 Jarm. Wills, 2nd ed. 49, 69, 103—113; 1 Rep. Leg. by White, 123; Smith's Executory Interests annexed to Fearn, § 210, 211; *Seiffert v. Badham*, 9 Beav. 370; *Gundry v. Pinniger*, 14 Beav. 98; 1 D. M. & G. 502; *Withy v. Mangles*, 4 Beav. 358; 10 Cl. & F. 215; *Lasbury v. Newport*, 9 Beav. 376; *Markham v. Icatt*, 20 Beav. 579; *Baker v. Gibson*, 12 Beav. 101; *Pearce v. Vincent*, 1 Cr. & M. 598; 2 Bing. N. C. 328; 2 M. & K. 800; 2 Keen 230; *Clapton v. Bulmer*, 5 My. & Cr. 108; *Jenkins v. Gower*, 2 Coll. 537; *Wilkinson v. Garrett*, 2 Coll. 643; *Smith v. Smith*, 12 Sim. 317; *Minter v. Wraith*, 13 Sim. 52; *Urquhart v. Urquhart*, 13 Sim. 613; *Ware v. Rowland*, 15 Sim. 587; 2 Phil. 635; *Butler v. Bushnell*, 3 My. & K. 232; *In re*

*Trusts of Barber's Will*, 1 S. & G. 118; *Bird v. Luckie*, 8 Hare 301; *Philps v. Evans*, 4 De G. & S. 188; *Gorbell v. Davison*, 18 Beav. 556; *Starr v. Newberry*, 23 Beav. 436; *Wharton v. Barker*, 4 K. & J. 483; *Downes v. Bullock*, 25 Beav. 54; *Moss v. Dunlop*, 1 Johns. 490; *Lee v. Lee*, 1 Drew. & Sm. 85; *Harrison v. Harrison*, 28 Beav. 21; *Pinder v. Pinder*, 28 Beav. 44; *Chalmers v. North*, 28 Beav. 175; *Lees v. Massey*, 3 D. F. & J. 113; *Re Greenwood's Will*, 3 Gif. 390; *Bullock v. Downes*, 9 H. L. Cas. 1; *Mortimore v. Mortimore*, L. R. 4 Ap. Cas. 448.

(b) See Smith's Executory Interests annexed to Fearn, § 215—222; *Day v. Radcliffe*, L. R. 3 Ch. D. 654.

(c) See Smith's Ex. Int. §222 a.

from the first moment of the instrument creating them taking effect (which, in the case of a deed, is the time of execution, and, in the case of a will, the death of the testator), it may be said that they will necessarily vest in right, if at all, within the period occupied by the life of a person in being, that is, already born, or in ventre matris, or the lives of any number of persons described and in being, "not exceeding that to which testimony can be applied to determine when the survivor of them drops," and by the infancy of any child born previously to the decease of such person or persons, or the gestation and infancy of any child in ventre matris at that time; or, within the period occupied by the life or lives of such person or persons in being, and an absolute term of twenty-one years afterwards, and no more, without reference to the infancy of any person; or, within the period of an absolute term of twenty-one years, without reference to any life (a). Thus, "if a limitation is to take effect on an indefinite failure of issue in general, or of issue male or female, or by a particular marriage, and not merely on a failure of issue within a life or lives in being and twenty-one years and a few months afterwards; it is within the foregoing rule against perpetuities, and therefore void for remoteness; unless it is a remainder after, or a limitation engrafted on an estate tail; or a limitation of a sum of money to be raised by means of a term in remainder after an estate tail; or a limitation over of a term which is determinable on the dropping of a life or lives in being, where a tenant right of renewal does not exist (b). The

(a) *Smith's Executory Interests* annexed to *Fearne*, § 706. See also *Co. Litt.* 271 b, n. (1), VII. 2; *Watk. Conv.* 3rd ed. by *Prest.* 104, 129, 131; *Burton*, § 824; *Lewis on Perpetuity*, 459, 460; *Rowland v. Turney*, 26 *Beav.* 67; *Heasman v.*

*Pearse*, L. R. 11 *Eq.* 522; reversed, L. R. 7 *Ch. Ap.* 275; *Hale v. Hale*, L. R. 3 *Ch. D.* 643.

(b) *Smith's Executory Interests* annexed to *Fearne*, § 714; *Webster v. Parr*, 26 *Beav.* 236; *Fisher v. Webster*, L. R. 14 *Eq.* 283, 290.

Pr. II. T. 9,  
Ch. 1, s. 2.

reason why some kind of limit was prescribed for the vesting of such executory interests is, that executory interests (other than those which are in remainder after or engrafted upon an estate tail, and which were capable of being destroyed by the tenant in tail by means of a recovery) could not be destroyed by the prior devisees or legatees; and they therefore tended to a perpetuity, by being unalienable until the contingency happened on which they were to vest in right, which is inconsistent with the welfare of the state, and therefore contrary to the policy of the law. Nor have the particular limits so prescribed been arbitrarily adopted. The Courts, in setting the bounds they have to the suspension of the vesting, have been governed by analogy to the case of a strict entail, which could not be protected from fines and recoveries, longer than for the life of the tenant for life in possession, and the attainment of twenty-one by the first issue in tail (a). A contingent limitation over of property from one charity to another, in the event of the former neglecting for a year to observe the directions of the will by which the property was bequeathed, is not within the principle of the rule against perpetuities, and therefore not within the rule; because the property is neither more nor less alienable on account of such limitation over (b). 882.

Stat. 45 & 46  
Vict. c. 39.  
Restriction  
on executory  
limitations.

[And now a further restriction is placed on executory limitations, contained in instruments coming into operation after the 31st day of December, 1882. For it is enacted by stat. 45 & 46 Vict. c. 39, s. 10 (Appendix), that "Where there is a person entitled to land for an estate in fee, or for a term of years absolute or determinable on life, or for term of life, with an executory limitation over on

(a) On the subject of remoteness, generally, see Mr. William David Lewis's learned and elaborate Treatise on the Law of Perpetuity. See

also Smith's Executory Interests annexed to Fearn, § 707—738.

(b) *Christ's Hospital v. Granger*. 1 Mac. & G. 460.



default or failure of all or any of his issue, whether within Pr. II. T. 9,  
Ch. 1, s. 5. or at any specified period of time or not, that executory limitation shall be or become void and incapable of taking effect, if and as soon as there is living any issue who has attained the age of twenty-one years, of the class on default or failure whereof the limitation over was to take effect.”] **882a.**

Where a person takes a vested interest at twenty-one, a direction that he shall not have the enjoyment of the property until a later period is inoperative, unless the enjoyment thereof is given to some other person in the meantime, or the property is so clearly taken from the devisee or legatee in the meantime, that there is an intestacy for the intervening period (a). **883.**

“Executory interests in real property, which are not contingent on account of the person, descend to the heirs of the persons to whom they are limited, and such executory interests in personal property pass to the executors or administrators of the persons to whom they are limited, where they die before the contingency happens on which such interests are to vest” (b). **884.**

Executory interests, not limited by way of remainder, if engrafted on an estate tail, might be destroyed by the tenant in tail by means of a common recovery. But such interests cannot be prevented or destroyed by any alteration whatsoever in the estate out of which or after which they are limited (c). **885.**

(a) *Gosling v. Gosling*, 1 Johns. 265.

annexed to Fearn, § 743.

(b) *Smith's Executory Interests*

(c) *Id.* § 789, 790.

Postponement of the enjoyment till after the period of vesting.

Transmission of executory interests.

Destruction of executory interests not limited by way of remainder.

## CHAPTER II.

OF RIGHTS OF ENTRY OR ACTION, MERE POSSIBILITIES,  
MERE ADVERSE POSSESSIONS, AND EXPECTANCIES.PART II.  
T. 9, CH. 2.

IN consequence of modern enactments, which are noticed in other parts of this work, the subject of this chapter is now of comparatively little practical importance, and therefore a very little space will here be given to it, though points connected with it will be found in subsequent pages.

Present rights of entry are of three kinds :

Rights of  
entry.

1. The right of immediate entry incident to a present vested interest, where the actual seisin or possession has never been acquired ; as in the case of an heir-at-law before entry, if the land is not out on lease for years (*a*). 886.

2. That right of immediate entry which is incident to a vested interest, where the actual seisin or possession has been lost by abatement, intrusion, or disseisin, but not the right of possession (*b*). 887.

3. That right of immediate entry which exists in favour of a person who has a present right to take advantage of a condition which has been broken, the breach of which does not ipso facto determine the estate which was subject to such condition (*c*). 888.

Rights of  
action.

A right of action for the recovery of an estate exists (as we shall see hereafter) in certain cases where there is originally no right of entry, or where the right of entry has ceased (*d*). 889.

(*a*) 1 Cruise T. 1, § 20.

(*b*) See Fearne, 286, and n. (*e*) ;  
2 Bl. Com. c. 13 ; 3 Bl. Com. 168,  
169 ; and Title on Adverse Pos-  
session, *infra*.

(*c*) See Fearne, 381, n. (*a*) I. 1,  
and par. 191—7, *supra*.

(*d*) See Part III. Tit. 6, Ch. 1,  
*infra*.

The word possibility has a general sense, in which it includes even executory interests which are the objects of a limitation. But in its more specific sense, it is that kind of contingent benefit which is neither the object of a limitation, like an executory interest, nor is founded in any lost but recoverable seisin, like the right of entry of the second kind. Of this nature is a possibility of reverter on the grant of a qualified or determinable fee (*a*). For, as the qualified or determinable fee may endure for ever, there cannot be any remaining portion of the seisin or ownership to constitute an actual reversion or to form the subject of any ulterior limitation in remainder (*b*). And of the same nature is a contingent right of entry in case there should be a breach of a condition subsequent. **890.**

PART II.  
T. 9, CH. 2.  
Possibilities.

A mere adverse possession, without any estate or interest, exists in the case of an abator, intruder, or disseisor, who, in the first instance, has the actual possession, but no right of possession (*c*). **891.**

Mere  
adverse  
possession

An expectancy is a general term which may include various kinds of future interests, but is specifically applied to a mere hope of succession, unfounded in any limitation, provision, trust, or legal act whatever: such as the hope which an heir apparent or presumptive has of succeeding to the ancestor's estate. This is sometimes termed a bare or mere possibility (*d*). **892.**

Expectan-  
cies.

It may be remarked in this place that property in chattels personal may be either in possession or in action. Property in possession is that of which a person has not only the right of enjoyment, but has also the actual enjoyment. Property in action is that to which a man has only a bare right, enforceable by action or suit, without any

Choses in  
possession  
and in  
action.

(*a*) Fearn, 381, n. (*a*), I. 1.

9; and see Part III. T. 6, c. 1, *infra*.

(*b*) See Smith's Executory Interests annexed to Fearn, § 159, 165, and *supra*, par. 834, 859—865.

(*d*) Fearn, § 301; Smith's Executory Interests annexed to Fearn, § 71.

(*c*) 2 Bl. Com. c. 13; 3 Id. 168—

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T. 9, CH. 2.

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occupation or enjoyment; and which is hence denominated a chose in action. The first is subdivided into two sorts—property in possession absolute, and property in possession qualified. The former is that to which a person has the exclusive and permanent right. The latter is that to which he has not an exclusive right, or not a permanent right, but a right which may sometimes subsist, and at other times not subsist; as in the case of game, water, and goods pawned or pledged upon condition (a). 893.

(a) See 2 Bl. Com. 389—396.

## CHAPTER III.

## OF POWERS.

I. *The Nature and different kinds of Powers (a).*

A POWER is an authority by which a person reserves to himself or confers on another the right to do an act in law (b). 894.

PART II.  
T. 9, CH. 3.  
Definition  
of a power.

Powers are of three kinds : 1. Common law authorities; as powers given by will, without the intervention of the Statute of Uses. 2. Statutory powers, not by way of use. 3. Powers limited by way of use, and operating under the Statute of Uses. Statutory powers, not by way of use, are sometimes designated by the general term of common law authorities (c). 895.

Different  
kinds of  
powers, as  
regards  
their origin.

In the case of a common law power given by a will, or of a statutory power not by way of use, the estate which is limited by the exercise of the power, passes by force of the will or Act of Parliament, and the appointor, in executing the power, merely nominates the person to take the estate; except in the case of a power of attorney given by one person to another to execute a conveyance for the former (d). 896.

How the  
estate  
passes in  
the case of  
an appoint-  
ment under  
a common  
law power  
or statutory  
power not  
by way of  
use.

Distinction  
between a  
power of  
attorney  
and other  
common  
law powers.

(a) On *Appointments and Leases under Powers*, see *infra*, Part III. T. 12, Ch. 3, ss. 6, 7. And see Lord St. Leonards' most learned and valuable work on Powers (ed. 7), from which, as the references show, many of the points are taken, although they are generally expressed in a different and condensed form. It is hoped that the selection, arrangement, and condensation of these

points within so small a compass, will prove of use to many; although of course it will be desirable for the reader to make himself master of the Treatise on Powers, and add from thence to the points contained in this Compendium.

(b) 4 Cruise T. 32, c. 13, § 1.

(c) See 1 Sugd. Pow. 1, 2, 171 — 2; 4 Cruise T. 32, c. 13, § 1.

(d) 1 Sugd. Pow. 1, 2, 242.

PART II.  
T. 2, CH. 2.

Nature of a  
power under  
the Statute  
of Uses.

Powers of  
appoint-  
ment, mere  
powers of  
revocation,  
and powers  
of revoca-  
tion and  
appoint-  
ment.

A power under the Statute of Uses is a mere right to declare a use which is to be executed by the Statute (a). 897.

Some of these powers are simply powers of appointment, serving to confer a right of declaring the original uses of a subject of property. Others are mere powers of revocation, serving to confer a right of setting aside uses previously declared. While others are powers of revocation and new appointment, giving a right of setting aside uses previously declared, and limiting new ones in their place, which the statute executes, as it executed the uses originally declared (b). 898.

Several of these powers are not usually called powers of revocation, such as powers of jointuring, leasing, and charging settled estates with the payment of money; yet all these are in fact powers of revocation as well as of appointment; for they operate as revocations pro tanto of the preceding estates (c). 899.

Powers may  
be given to  
a person  
who has or  
had an  
estate, or to  
a stranger  
for his own  
or another's  
benefit.

A power may be given or reserved, 1. To a person who has an estate limited to him by the deed creating the power; 2. To a person who had an estate at the time of the execution of the deed, but conveys away such estate by that deed, reserving to himself a power over the property; 3. To a stranger to whom no estate is given, but for whose benefit the power is to be exercised; or 4. To a stranger to whom no estate is given, and by whom the power is to be exercised for the benefit of some other person (d). 900.

Hence  
powers are  
either  
connected or  
uncon-  
nected

Powers limited to the first three persons above mentioned may be termed powers connected with an interest; while powers limited to the person last mentioned may

(a) 1 Sugd. Pow. 224; Co. Litt. 271 b, n. (1), VII. 1.

(b) See 1 Sugd. Pow. 462; 4 Cruise T. 32, c. 13, § 3.

(c) 4 Cruise T. 32, c. 13, § 4; Co. Litt. 271 b, n. (1), VII. 1.

(d) 1 Sugd. Pow. 39, 40.

be termed powers unconnected with an interest, or naked powers. **901.**

PART II.  
T. 9, CH. 3.

with an  
interest.  
Powers  
relating to  
the land,  
and powers  
collateral.

Powers limited to the first two persons above mentioned, when they concern lands, are sometimes termed powers relating to the land (*a*); while powers limited to the person last described are generally called powers collateral to the land, or simply collateral. The term collateral is, however, also applied to certain other powers (*b*). **902.**

For, powers limited to the first three persons above mentioned are divided into powers appendant or appurtenant, and powers collateral or in gross (*c*). Powers appendant or appurtenant are those which are limited to a person to whom an estate is limited by the deed creating the power, and which enable him to create an interest which will wholly or partly fall within the compass of and affect that estate; as where an estate for life is limited to a person, with a power of granting leases in possession (*d*). Powers collateral or in gross are those which, even if given to a person to whom an estate is limited, do not enable him to create an interest which will wholly or partly fall within the compass of and affect that estate (*e*). A power simply collateral, or a naked power, or a power unconnected with an interest, is a power given to a person who had no interest at the time of the execution of the deed, and to whom no estate is limited by the deed, to dispose of or charge property in favour of some other person; as where a power is given to a stranger to revoke a settlement, and appoint new uses (*f*). **903.**

Division of  
powers into  
appendant  
or ap-  
purtenant,  
and collate-  
ral or in  
gross.

Definition  
of powers  
appendant  
or ap-  
purtenant.

Definition  
of powers  
collateral or  
in gross.

Definition  
of a power  
simply  
collateral or  
a naked  
power, or a  
power un-  
connected  
with an  
interest.

(*a*) 4 Cruise T. 32, c. 13, § 5; Co. Litt. 242 b, n. (1), II.; Watk. Conv. 3rd ed. by Prest. 139.

(*b*) 4 Cruise T. 32, c. 13, § 5; 1 Sugd. Pow. 40, 41; Co. Litt. 242 b, n. (1), II.; Watk. Conv. 3rd ed. by Prest. 139.

(*c*) 1 Sugd. Pow. 40, 41.

(*d*) See 1 Sugd. Pow. 40; 4 Cruise

T. 32, c. 13, § 6; Co. Litt. 242 b, n. (1), II.; Watk. Conv. 3rd ed. by Prest. 139.

(*e*) See 1 Sugd. Pow. 40, 41; 4 Cruise T. 32, c. 13, § 9, 10; Co. Litt. 242 b, n. (1), II.; Watk. Conv. 3rd ed. by Prest. 139.

(*f*) 1 Sugd. Pow. 42; 4 Cruise T. 32, c. 13, § 11.

PART II.  
T. 9, CH. 3.General and  
particular  
powers.

Powers are also divided into general and particular. A general power is a right to appoint to any person or persons the donee may choose to select. A particular power is a right to appoint to certain objects designated in the instrument creating the power (a). 904.

Powers in  
the nature  
of trusts, or  
containing  
gifts by  
implication.

Some powers of selection and distribution, where there is no limitation over in default of appointment, are in the nature of trusts, which it is the duty of the donee to execute; and some, though not in the nature of trusts, are regarded as containing a gift by implication to the objects of the power. In either case if the power be not exercised, all the objects who are within it generally take in equal shares (b). 905.

Power of  
disposition  
by will, not  
constituting  
a power of  
appoint-  
ment.

Where in a partnership deed it is stipulated that the interest of one of the partners in the partnership concern, in case of his death before the expiration of the partnership term, shall not belong to the surviving partner, but shall go to such persons or person as he shall by will name and appoint, and in default of such appointment, to his widow, children, executors, or administrators, as therein mentioned, this does not create a power of appointment in the technical sense, but is a mere bargain that the partnership property shall not accrue to the surviving partner, but that the partner to whose share the stipulation relates shall have a power of disposing of it by will, or, if he should die intestate, that it shall devolve to his family. And therefore it will pass under the general description in his will, of "all other his estate and effects of whatsoever nature or description," without any allusion to the power (c). 906.

(a) 1 Sugd. Pow. 471; Co. Litt. 271 b, n. (1), VII. 2.

(b) 2 Sugd. Pow. 7th ed. 158—165; Hill on Trustees, 27—32; 1

Jarm. Wills, 2nd ed. 461.

(c) *Ponton v. Dunn*. 1 Russ. & My. 402.



## II. *The Creation of Powers.*

Any words which clearly indicate an intention that a person should have a power are sufficient to create one, whether in a deed or in a will (a). **907.**

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T. 9, CH. 3.

Indication  
of intention  
to create a  
power is  
sufficient.

Forms  
required.

By the old law, it was not necessary that the author of a power should require the observance of any particular forms in the execution thereof. So that a power, even though it related to real estate, might be reserved to be executed by a simple note in writing or by an unattested will. But if the author of the power required it to be executed by a will, or a writing purporting to be a will, without saying more, the power could only be exercised by a will duly executed, like any other, under the Statute of Frauds. This distinction, however, applies only to wills made before the year 1838. For by sect. 10 of the stat. 1 Vict. c. 26, "no appointment made by will, in exercise of any power shall be valid, unless the same be executed in manner required" by the Act with respect to ordinary wills (b). And a testator cannot by his will prospectively create for himself a power to dispose of his property by a will or codicil not duly executed as such (c). **908.**

Powers could not be reserved on a bargain and sale to any but the bargainor, as the consideration must be paid to him in order to raise the use (d). But where a power is limited by way of use by a conveyance operating by transmutation of possession, the appointee acquires an equitable estate or a use by the appointment, and then the Statute of Uses instantaneously transfers the legal estate itself to him, without reference to any consideration (e). **909.**

Where a  
considera-  
tion is  
necessary.

Where an estate is to arise by the exercise of a power.

(a) See 1 Sugd. Pow. 118, 119;  
4 Cruise T. 32. c. 13, § 14; *Freeland v. Pearson*, L. R. 3 Eq. 658;  
*In re Stringer's Estate, Shaw v. Jones-Ford*, L. R. 6 Ch. D. (Ap.) 1.

(b) 1 Sugd. Pow. 155—157.

(c) *Johnson v. Bull*, 5 De G. & S. 85.

(d) 1 Sugd. Pow. 160.

(e) 1 Sugd. Pow. 161, 162.

the seisin out of which it is to be served must be commensurate with such estate, as the estate cannot endure beyond the seisin out of which it is to arise. So that if a life estate were conveyed to A. to such uses as B. should appoint, and B. were to appoint to C. in fee, the estate appointed to C. would cease on the death of A. And where it is intended to confer the power of creating a legal estate by an appointment by force of the Statute of Uses, and not a mere equitable estate, the land should be conveyed to the releasee, etc., to the uses intended to be appointed, and not to and to the use of the releasee, etc., to the uses intended to be appointed (a). 910.

### III. Powers to appoint to Children or Relations.

Power to appoint to younger children.

A younger child who becomes the eldest, and as such takes the estate provided for the eldest or only son, before receiving his portion, is not within a power of appointing portions for younger children (b). And on the other hand, an elder son unprovided for may take under such a provision (c). 911.

What interests are authorised.

Under a power to appoint real or personal property amongst children in such proportions as the donee shall think fit, he need not give absolute interests to any one or more of them, but he may carve it out into particular interests as he pleases. But a merely reversionary interest cannot be given to any one child, if it is intended for a portion (d). 912.

Exclusive power of appointment among the children.

In a settlement of a wife's property, an exclusive power of appointment, by deed or will, among her children, ought to be given her in priority to the limitations in favour of the children (e). 913.

(a) 1 Sugd. Pow. 175. See supra, par. 690—2.

(b) 2 Sugd. Pow. 269.

(c) 2 Sugd. Pow. 270—1.

(d) Id. 272, 273.

(e) *Oliver v. Oliver*, L. R. 10 Ch. D. 765.

Where estates are devised in strict settlement, with a general power for a tenant for life to charge portions for his younger child or children, such a power includes all the younger children by any marriage (a). **914.**

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Power to charge portions for younger children.

Where a testator bequeaths upon trust, after the decease of the prior takers, for their children in such shares as the survivor shall by will appoint, this creates a gift to the children, subject to the power; but the objects of the power and the gift are the children living at the death of the surviving parent (b). **915.**

Implied gift to surviving children subject to a power.

Although a power to raise portions out of real estate be given generally, yet equity will not permit it to be exercised in such a manner as to raise them, or even to render them vested so as to be transmissible, before the time when the portions are wanted, although interest be given in the meantime. And although the power is to raise the portions when the parent shall think proper, yet that is only to enable him to raise them in his lifetime, if necessary (c). **916.**

Power to raise portions not available until they are wanted.

A power to appoint "amongst the children as the donee shall think proper," does not authorise an exclusive appointment (d): a discretion is only given as to the amount. **917.**

Whether an exclusive appointment is authorised.

Where a person has a power of selection amongst his family or relations, he may appoint to relations who are not capable of taking under the Statutes of Distribution. But where a person has only a power of appointing to his family or relations generally, and not to such of them as he shall think fit, he can only appoint to the next of kin within those statutes (e). **918.**

Power to appoint to relations.

(a) 2 Sugd. Pow. 281.

(d) 1 Sugd. Pow. 538.

(b) *Woodcock v. Renneck*, 4 Beav. 190; 1 Phil. 72.

(c) 2 Sugd. Pow. 242, 243. *Snow v. Tred*, L. R. 9 Eq. 622. See *infra*, Part III. Tit. 15, Ch. 1, s. 6, No. VII.

(e) See 2 Sugd. Pow. 281, 283.

IV. *Shares in Default of Appointment.*PART II.  
T. 9, CH. 3.Implied gift  
in default  
of appoint-  
ment.

If a fund is given to such of a certain class of persons, or to a certain class of persons in such proportions, as a third person shall appoint, and there is no express gift in default of appointment, there is an implied gift to them in default of appointment, and if no appointment is made, they will take equally (a). So that where a bequest was made to several relations "or their children," in such proportions as another person should appoint, and no appointment was made, such relations and their children all took in equal shares, because there was a general intention in favour of the whole class; and as the particular intention in favour of particular individuals of the class to be selected by the donee of the power failed, by reason of the selection not being made, the Court carried into effect the general intention (b). But if a person, making no gift himself, merely empowers another, by a power or a trust, to give property, the gift must be made, or no person can claim, though the persons to whom the intended gift was to be confined are named (c). 919.

Appointees  
entitled to  
share in the  
gift in  
default of  
appoint-  
ment.

Where there is no hotchpot clause, appointments to one or more of a class of an equal portion or equal portions of the fund, will not exclude him or them from being an object of the gift in default of appointment (d). Also an appointment of a part of a fund to one of a class, "as and for her part, share, or proportion," will not prevent her participating in the unappointed fund limited to the class equally in default of appointment (e). 920.

(a) 2 Spence's Eq. Jur. 83; Sugd. Pow. 8th ed. 591—5; *Salisbury v. Denton*, 3 K. & J. 529; *Reid v. Reid*, 25 Beav. 469; *Izod v. Izod*, 32 Beav. 242; *Lambert v. Thwaites*, L. R. 1 Eq. 51; *Re Phene's Trusts*, L. R. 5 Eq. 346; *Re Caplin's Will*, 2 Dr. & Sm. 527.

(b) *Penny v. Turner*, 2 Phil. 493; *Re White's Trusts*, 1 Johns. 656.

(c) 2 Spence's Eq. Jur. 84; *Re Eldon's*, 1 Dr. & Sm. 395.

(d) 2 Sugd. Pow. 217; *Warmley v. Vaughan*, 1 D. & J. 114, 126.

(e) *Wombwell v. Hanrott*, 14 Beav. 143; 1 Sugd. Pow. 354; 2 Id. 217.

A power of appointment does not prevent the vesting of real or personal estate limited in default of appointment, but the interests limited in default of appointment vest, subject to be divested by an exercise of the power (a). 921.

PART II.  
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Shares in  
default of  
appoint-  
ment vest.

### V. Powers to Sell, Mortgage, Charge, or Exchange.

Any words from which it can be inferred to have been the intention of the testator that his lands shall be sold for payment of his debts, will operate as a power of sale (b). 922.

Power to sell  
for payment  
of debts.

Where a will contains a direction or power to raise money out of the rents and profits of an estate, to pay debts, portions, or legacies, and the money must be raised and paid before it could be raised out of the rents and profits, Courts of Equity have extended those words to a power to raise by sale or mortgage, unless restrained by other words (c). 923.

Effect of a  
direction or  
power to  
raise money  
out of rents.

But where the words are to raise a sum of money out of the annual profits, there the trustees cannot sell or mortgage (a). 924.

or annual  
profits.

In equity, an unlimited power to charge an estate authorises a trust to sell the estate, and divide the proceeds amongst the objects of the charge; and a power to grant the land enables a charge of a sum of money on the land (e). 925.

Effect of an  
unlimited  
power to  
charge.

Effect of a  
power to  
grant.

A power given generally to raise a sum out of an estate authorises a sale of such estate (f). 926.

Power "to  
raise a  
sum."

see 2 Ves. J. 356, and *Foster v. Cautley*, 3 Sm. & G. 96; 6 D. M. & G. 55, 65, 67, as to the words "in lieu of" a share.

(a) 2 Sugd. Pow. 4, 5; *Watk. Conv.* 3rd. ed. by Prest. 146; *Smith's Executory Interests* annexed to *Fearne*, § 369 a.

(b) 6 Cruise T. 38, c. 16, § 26.

(c) *Story's Eq. Jur.* § 1064, 1064 a; 2 *Spence's Eq. Jur.* 316, 406; 4 *Cruise T.* 32, c. 13, § 19.

(d) 4 *Cruise T.* 32, c. 13, § 19.

(e) 1 *Sugd. Pow.* 485, 586; 4 *Cruise T.* 32, c. 16, § 55.

(f) 1 *Sugd. Pow.* 513.

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A power to trustees to raise by mortgage a certain sum out of an estate, implies a power also to raise the incidental costs of the mortgage (*a*). 927.

A power to mortgage does not authorise a sale.

A power to a trustee to mortgage does not give him authority to sell (*b*). 928.

Where a power to sell authorises a mortgage.

"Generally speaking, a power of sale or trust for sale out and out for a purpose or with an object beyond the raising of a particular charge, does not authorise a mortgage; but where it is for raising a particular charge, and the estate itself is settled or devised subject to that charge, there it may be proper to raise the money by mortgage, and the Court will support it as a conditional sale" (*c*). 929.

Power for trustees for sale, to sell by auction, etc.

[Where a trust for sale, or a power of sale of property is, under an instrument coming into operation on or after the 1st of January, 1882, vested in trustees, they may sell or concur with any other person in selling, either subject to prior charges or not, and either together or in lots, by public auction or private contract, subject to such conditions as they think fit, and with power to vary or rescind any contract for sale, and to buy in, and resell, without being answerable for any loss. But this applies only so far as a contrary intention is not expressed in the instrument, and is subject to its terms and provisions (*d*).] 929a.

Where there is power to charge with the interest.

Where a person has a power to charge lands with a sum of money, he may also charge them with the payment of the interest; because the principal must carry interest; otherwise it could not be raised (*e*). 930.

As to perpetuities.

A power of sale or exchange need not be expressly

(*a*) *Armstrong v. Armstrong*,  
L. R. 18 Eq. 541.

(*b*) *Clarke v. Royal Panopticon*,  
4 Drewry 26.

(*c*) *Stroughill v. Austey*, 1 De G.  
Mac. & G. 645. See also 1 Sugd.  
Pow. 513; 2 Spence's Eq. Jur. 369,

409; *Haldenby v. Spofforth*, 1 Beav.  
390; *Devaynes v. Robinson*, 24 Beav.  
86.

(*d*) Stat. 44 & 45 Vict. c. 41,  
s. 35, in Appendix.

(*e*) 4 Cruise T. 32, c. 13, § 18; 1  
Sugd. Pow. 515, 516; 2 Id. 283.

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— —

confined within the rule against perpetuities ; because, if there is a preceding estate tail, such a power may be barred by the tenant in tail ; and if there is only a preceding life estate, yet when once an estate in fee in possession in the entire property has been acquired by any one claiming under the limitations of the settlement by which the power was created, it naturally ceases (a). 931.

Where a power of sale is given, without restriction, to a person having a limited interest only, it may well be held that the power to sell imports a negative upon the power to buy ; because the power to sell is in the nature of a trust, and it is obvious that the person who is interested to sell cannot in such a case safely be permitted to buy. And even a restriction put upon the power of sale will not in all cases authorise the person to whom the power to sell is given to become the purchaser of the estate which is the subject of the power. But there are cases in which the Court would permit the person who has the power to sell to become the purchaser of the estate. It must in each case depend on the circumstances under which, and the purposes for which the power was given, and upon the nature and extent of the restrictions which are put upon the exercise of the power. In proportion as the power is restricted, the dangers incident to allowing the donee to purchase are diminished (b). 932.

Where power of sale negatives power to buy.

[Where a power of sale in a settlement is given to trustees and the survivor, his executors and administrators, trustees appointed by the Court in place of those trustees could not formerly exercise the power (c) ; although it is doubtful whether a similar inability existed where the trustees had the legal fee in trust to sell (d). But the law

Power of sale not formerly exercisable by trustees appointed by the Court.

(a) 2 Sugd. Pow. 472 ; *Lantsbery v. Collier*, 2 K. & J. 709 ; and see *Wolley v. Jenkins*, 23 Beav. 53, 61—3 ; *Tate v. Swinstead*, 26 Beav. 525.

(b) Sir G. J. Turner, V.-C., in

*Beaden v. King*, 9 Hare 519.

(c) *Newman v. Warner*, 1 Sim. (N. S.) 457.

(d) See an article in the Jurist, vol. 2 (N. S.), 389.

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Stat. 44 & 45  
Vict. c. 41.  
The Con-  
veyancing  
and Law of  
Property  
Act, 1881.  
Powers of  
new trustees  
appointed  
by the  
Court.

is now changed, and the doubt set at rest by the provisions of the stat. 44 & 45 Vict. c. 41, s. 33 (Appendix), which enacts that "Every trustee appointed by the Court of Chancery, or by the Chancery Division of the Court, or by any other Court of competent jurisdiction, shall, as well before as after the trust properly becomes by law, or by assurance, or otherwise, vested in him, have the same powers, authorities, and discretions, and may in all respects act, as if he had been originally appointed a trustee by the instrument, if any, creating the trust." And this applies to appointments made previously to, as well as after the passing of the Act.] **933.**

Sale after  
many years.

The lapse of many years does not affect the right to exercise an implied power of sale. And it has been held that where a sale is made (even after a lapse of many years, e.g., twenty-seven years) under an implied power of sale for payment of debts, the vendors are not bound to state whether there existed any debts which made a sale necessary (a). **934.**

#### VI. Powers of Revocation.

Powers of  
revoking  
either  
totally or  
partially.  
Revocation  
by a new  
appoint-  
ment.

A power may be reserved to revoke either the whole settlement or any particular limitation only (b). **935.**

If a man has a power of revocation and of limiting new uses, and he limits new uses, that is a revocation (c). And so where a deed contains a power of revocation by deed, and the person to whom it is given executes a deed disposing of the property in a manner inconsistent with the dispositions contained in the first deed, that amounts to an execution of the power (d). **936.**

(a) *Sabin v. Heape*, 27 Beav. 553; *Greetham v. Colton*, 34 Beav. 615.

(b) 1 Sugd. Pow. 177.

(c) 1 Sugd. Pow. 415, 416; 2 Pres. Shep. T. 526.

(d) *Comlishaw v. Hardy*, 25 Beav. 169.



A power to appoint new uses implies a power to revoke the former ones; for otherwise the power to appoint new uses could not be exercised (*a*). And a power to do an act (as a power of sale) which cannot be fully effected without an appointment, authorises an appointment, and therefore a revocation (*b*). 937.

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Power to  
appoint new  
uses implies  
power to  
revoke old  
uses.

On the other hand, although in the *original settlement* a power of revocation only be reserved, yet a power to limit new uses is implied, unless a contrary intention can be collected, or it is declared that the estate shall remain to the use of the settlor and his heirs, or the estate is expressly limited to other uses (*c*). 938.

A power to  
revoke old  
uses implies  
a power to  
appoint new  
uses.

Whether the power be a general or special one, unless perhaps it be a simply collateral power, the donee may, by the appointment, reserve a power of revocation or of revocation and new appointment; and such a power may be reserved toties quoties (*d*). 939.

Power of  
revocation  
may  
generally be  
reserved on  
an appoint-  
ment.

A person who has a power of revocation may revoke part at one time and part at another; but he cannot revoke either the whole or the same part more than once, by deed, unless he reserves a new power of revocation in the deed of revocation (*e*). For even where the original power expressly authorises the donee to appoint and to revoke his appointments from time to time, yet on every execution a new power of revocation must be reserved (*f*). 940.

Revocation  
at different  
times.

Necessity of  
reserving a  
new power  
of revoca-  
tion.

Where a person settles his estate to the use of himself for life, remainder over, reserving to himself a power of

Effect of the  
exercise of a  
power of  
revocation.

(*a*) 4 Cruise T. 32, c. 13, § 22; 1 Sugd. Pow. 238; Co. Litt. 271 b, n. (1), VII. 1; Watk. Conv. 3rd ed. by Prest. 146.

(*b*) 1 Sugd. Pow. 238.

(*c*) 1 Sugd. Pow. 461, 462. As to the question, whether a power of revocation only in a deed *executing* a power, authorises a limitation of new uses, see 1 Sugd. Pow. 454—

462; and *Sheffield v. Donnop*, 7 Hare 42.

(*d*) 1 Sugd. Pow. 446, 462—3; 4 Cruise T. 32, c. 13, § 23, 25.

(*e*) 2 Pres. Shep. T. 525, n. 32; 4 Cruise T. 32, c. 13, s. 23; 1 Sugd. Pow. 243, 449; Watk. Conv. 3rd ed. by Prest. 147.

(*f*) 1 Sugd. Pow. 449.

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revocation, and executes his power, he becomes immediately seised of his former estate, without any entry or claim (a). **941.**

## VII. *The Extinction, Suspension, Qualification, Merger, Disclaimer, and Cesser of Powers.*

Extinction  
by execu-  
tion.

The first and most obvious mode by which powers may be extinguished, is by a complete execution of them (b). **942.**

Second  
execution,  
where first  
is defective.

If a power reserved over a legal estate is defectively executed at first, it may be executed over again, and the last execution will stand; the first being a mere nullity (c). **943.**

Extinction  
by the death  
of the  
person  
whose  
consent is  
required.

If a person or one of the persons whose consent is necessary to the execution of a power, dies before it is executed, and without having assented, the power is extinguished (d). **944.**

Extinction  
of power  
simply  
collateral.

Except by a complete execution of it, a power simply collateral [could not under the old law] be suspended, barred, or extinguished by any act whatever of the donee or of any other person (e). **945.**

[But such a power may now be extinguished by deed, for it is enacted by stat. 44 & 45 Vict. c. 41, s. 52 (Appendix), that "A person to whom any power, whether coupled with an interest or not, is given, may by deed release, or contract not to exercise, the power." And this applies to powers created by instruments coming into operation either before or after the commencement of the Act.] **945a.**

Power

A total alienation of the estate operates as an extinguish-

(a) 4 Cruise T. 32, c. 16, § 79, 81.

(b) 4 Cruise T. 32, c. 18, § 1.

(c) 4 Cruise T. 32, c. 18, § 2.

(d) 1 Sugd. Pow. 319; and see 23 Beav. 60.

(e) 1 Sugd. Pow. 45, 46; 4 Cruise T. 32, c. 18, § 17, 18; 2 Pres. Shep. T. 333; Co. Litt. 242 b, n. (1), III.; Watk. Conv. 3rd ed. by Prest. 151.

ment of a power appendant, where it cannot be exercised without defeating or prejudicing the interest granted. Thus, if tenant for life, with a power to grant leases in possession, conveys away his life estate, the power is extinguished; because the donee could not exercise it without derogating from his own grant (a). Upon the same principle, if the whole fee is in the terre-tenant, subject to a power of appointment; as where an estate is limited to him for life, remainder to such uses as he shall appoint, and, in default of appointment, to him in fee, or where it is limited to such uses as he shall appoint, and, in default of appointment, to him in fee, there, if he conveys the whole estate to a stranger in fee, his power of appointment is destroyed (b).

**946.**

PART II.  
T. 9, CH. 3.

appendant  
extin-  
guished by  
total aliena-  
tion of the  
estate or  
interest.

Where a person having a power appendant makes a feoffment or other conveyance of the land only for the purpose of creating a particular estate, as an estate for life or a term for years, this does not extinguish the power; but in some cases it suspends the power during such particular estate, and in other cases, it curtails the power in such a way, that any interest created by the power must be subject to the particular estate or interest previously created (c). And where a tenant for life, with powers of leasing, jointuring, and charging, parts with the beneficial interest in the estate by conveying it to a person for ninety-nine years, if he shall so long live, the freehold remains still in him, and his powers are not destroyed. And when he joined with the remainderman in suffering a common recovery, the conveyance to make a tenant to the præcipe was usually during the joint lives of the tenant for life, and the intended

Powers  
suspended,  
curtailed, or  
qualified by  
partial  
alienation.

(a) 1 Sugd. Pow. 56; Burton, § 177; 4 Cruise T. 32, c. 18, § 5 6, 7; Co. Litt. 242 b, n. (1), IV.; Watk. Conv. 3rd ed. by Prest. 150; *Alexander v. Mills*, L. R. 6 Ch. Ap. 124; but see *infra*, par. 950a.

(b) 4 Cruise T. 32, c. 18, § 14; Burton, § 175; 1 Sugd. Pow. 79; Co. Litt. 242 b, n. (1), IV.

(c) 4 Cruise T. 32, c. 18, § 9; Burton, § 176; 1 Sugd. Pow. 47—51; Co. Litt. 242 b, n. (1), IV.

PART II.  
T. 2, Ch. 2.

tenant to the præcipe, so that the reversion remained in the tenant for life, and all his powers were thereby preserved (a). And a power appendant is not destroyed by a mortgage, security, or charge; but it may be suspended, curtailed, or qualified thereby (b). 947.

Extinction  
of powers in  
gross by  
conveyance.

With respect to those powers relating to land which are called powers in gross, as the estates to be created by them do not fall within the compass of the person's estate to whom they are given, a conveyance or alteration of that estate will not affect them (c). And although a tenant for life assume to pass a fee, yet, if he conveys by an innocent conveyance (and all conveyances are now of that character), the power will not be destroyed; because such conveyances pass only what the tenant for life lawfully may pass, namely, his estate for life (d). But formerly, if a tenant for life, with power to jointure or to create any other estate to commence after his own, conveyed away his estate by feoffment to a stranger and his heirs; as this species of assurance, prior to the recent enactments, 7 & 8 Vict. c. 76, s. 7, and 8 & 9 Vict. c. 106, s. 4 (e), not only transferred the estate which the feoffer might lawfully pass, but also a tortious fee, the whole inheritance was divested, and the seisin out of which the uses created by the power were to be fed was destroyed, by which means the power became extinct. And if a tenant for life levied a fine or suffered a recovery of the lands, the power was also destroyed, unless the fine or recovery were accompanied, preceded, or followed by a deed by which it was directed to operate as a confirmation or exercise of the power (f). But a feoff-

(a) 4 Cruise T. 32, c. 18, § 16.

(b) 1 Sugd. Pow. 57, 62; Co. Litt. 242 b, n. (1). IV.

(c) 4 Cruise T. 32, c. 18, § 11; 1 Sugd. Pow. 85; Co. Litt. 242 b, n. (1), V.

(d) 1 Sugd. Pow. 85—6; Co. Litt. 242 b, n. (1), V.

(e) See *infra*, Part III. Tit. 12, Ch. 2, s. 1, end.

(f) 4 Cruise T. 32, c. 18, § 13; 1 Sugd. Pow. 93, 94; Co. Litt. 242 b, n. (1), VI.

ment, fine, or any other assurance of a part of the land, PART II.  
T. 9, CH. 3. was an extinguishment of the power as to that part only (a). 948.

Present powers relating to the land, whether append- Extinction  
of powers by  
release. ant or in gross, may be destroyed by a release to any one having an estate of freehold in possession, remainder, or reversion, in the land to which the power relates (b). 949.

Any contract entered into by the donee of a power, with Prevention  
of exercise of  
powers by  
contract. which an exercise of the power would be inconsistent, prevents, at least in equity, a valid exercise of it (c). 950.

[But with respect to the powers of limited owners under Stat. 45 & 46  
Vict. c. 38.  
The Settled  
Land Act,  
1882.  
Powers of  
limited  
owners  
under, not  
assignable;  
contract not  
to exercise  
the powers  
void. stat. 45 & 46 Vict. c. 38, it is enacted by s. 50 (Appendix), that “(1) The powers under this Act of a tenant for life are not capable of assignment or release, and do not pass to a person as being, by operation of law or otherwise, an assignee of a tenant for life, and remain exerciseable by the tenant for life after and notwithstanding any assignment, by operation of law or otherwise, of his estate or interest under the settlement. (2) A contract by a tenant for life not to exercise any of his powers under this Act is void. (3) But this section shall operate without prejudice to the rights of any person being an assignee for value of the estate or interest of the tenant for life; and in that case the assignee’s rights shall not be affected without his consent, except that, unless the assignee is actually in possession of the settled land or part thereof, his consent shall not be requisite for the making of leases thereof by the tenant for life, provided the leases are made at the best rent that can reasonably be obtained, without fine, and in other respects are in conformity with this Act. (4) This section extends to assignments made or coming

(a) 4 Cruise T. 32, c. 18, § 8; 1 n. (1), V.  
Sugd. Pow. 98.

(b) 4 Cruise T. 32, c. 18, § 3; 1 (c) Co. Litt. 242 b, n. (1), VII.;  
Sugd. Pow. 89, 90; Co. Litt. 242 b, *Davies v. Huguenin*, 1 Hem. & Mill.  
730.

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into operation before or after, and to acts done before or after the commencement of this Act; and in this section, assignment includes assignment by way of mortgage, and any partial or qualified assignment, and any charge or incumbrance; and assignee has a meaning corresponding with that of assignment.”] **950a.**

Merger of powers.

A power given to a person having a particular estate in the land, is merged by his acquisition of the fee simple. (a). **951.**

Disclaimer of powers by trustees.

[A power may now be disclaimed by a trustee, without affecting the exercise of it by a co-trustee or co-trustees, for stat. 45 & 46 Vict. c. 39, s. 6 (Appendix), enacts that “(1) A person to whom any power, whether coupled with an interest or not, is given, may, by deed, disclaim the power; and, after disclaimer, shall not be capable of exercising or joining in the exercise of the power. (2) On such disclaimer the power may be exercised by the other or others, or the survivors or survivor of the others, of the persons to whom the power is given, unless the contrary is expressed in the instrument creating the power.” And this section is retrospective.] **951a.**

Cesser of power by failure of object.

Where there is no object for the execution of a power, it of course ceases (b). And a power of sale and exchange in a settlement subsists only for the purposes thereof, and during the time when the uses thereof continue to subsist (c). **952.**

### VIII. Powers generally.

Perpetuity. Distinction between general and particular powers as regards perpetuity.

Where the object of a power, whether in a deed or will, is to create a perpetuity, it is void (d). But a power will not be void, because if exercised in a certain way it would transgress the rule against perpetuities, if it need not be exercised in that way (e). As a general

(a) 4 Cruise T. 32, c. 18, § 25.

(d) 1 Sugd. Pow. 178.

(b) Id. § 27.

(e) *Stark v. Lukyns*, L. R. 10

(c) *Wolley v. Jenkins*, 23 Beav. 53.

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power is tantamount to a limitation in fee in this respect, because it enables the donee to dispose of the fee or any less estate to whom he pleases, and as soon as he pleases, there is not even a tendency to a perpetuity in such a power. And though the interest of the person who takes until appointment is in effect tied up, it is for no longer period than the life of the donee of the power. But particular powers have a tendency to a perpetuity, and therefore, under a particular power, as a power to appoint to children, no estate can be created which would not have been valid if limited in the deed or will creating the power. In the case of a power created by will, to appoint to children, those who are born in the testator's lifetime, though after his will, stand in the same situation as children born at the execution of the deed, where the power is created by deed (a). **953.**

A power may be given to a person in esse to appoint an estate amongst his grandchildren or more remote issue born during his life ; and even where the power is given to appoint to grandchildren or more remote issue generally, yet if he only appoints to such as are living at his death, it will be good. And a power to appoint to "issue," includes all issue, however remote, born in due time (b). **954.**

Power to  
appoint to  
remote  
issue.

Where personal property is limited to a person for life, and then for such persons, etc., as he shall appoint by will, and, in default of appointment, to his executors or administrators, the donee of the power may assign the fund absolutely, and thereby extinguish the power. And where, in default of appointment, the fund is settled on another, the donee may, with the concurrence of that person, make a present title to the fund (c). **955.**

Limitation  
for life with  
power of  
appoint-  
ment.

(a) 1 Sugd. Pow. 471—475 ; Co. Litt. 271 b, n. (1), VII. 2.

(b) 1 Sugd. Pow. 179, 475.

(c) Id. 79, 80 ; *Barton v. Briscoe*, Jac. 603 ; *Page v. Soper*, 11 Hare, 321.

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A gift by will to a person for life, with a power of appointing at or after his decease includes a power of appointing either by instrument inter vivos or by will, unless limited by context to a testamentary power (a). 955a.

Where a power may be exercised by some other person than the donee.

Where the power does not involve any personal trust or confidence, but it is tantamount to an ownership, it may be exercised by attorney, in the same manner as a fee simple may be conveyed by attorney (b). And where a power is given to a person and his assigns, and it is annexed to an interest in the donee, it will pass with it to any person who comes to the estate mediately or immediately under him, whether the claimant is an assignee in fact, or an assignee in law, as an heir or executor. And the donee of a power not annexed to an interest may delegate the power by virtue of an express authority in the deed by which it was created (c). But a donee of a power involving personal confidence cannot create a new power in a person who is merely an object of the power (d). 956.

Payments or acts under a power of attorney.

By the stat. 22 & 23 Vict. c. 35, s. 26, "no trustee, executor, or administrator making any payment or doing any act bonâ fide under or in pursuance of any power of attorney shall be liable for the moneys so paid or the act so done, by reason that the person who gave the power of attorney was dead at the time of such payment or act, or had done some act to avoid the power, provided that the fact of the death, or of the doing of such act as last aforesaid, at the time of such payment or act bonâ fide done as aforesaid by such trustee, executor, or administrator, was not known to him: Provided always, that nothing herein contained shall in any manner affect or prejudice the right of any person entitled to the money against the person to

(a) *In re Jackson's Will*, L. R. 13 Ch. D. 189.

(b) 1 Sugd. Pow. 215, 216, 237; 4 Cruise T. 32, c. 16, § 67; *White v. Wilson*, 1 Drewry 304.

(c) 1 Sugd. Pow. 215; 4 Cruise T. 32, c. 7, § 22. and c. 16, § 68.

(d) *Carr v. Atkinson*, L. R. 14 Eq. 397.



whom such payment shall have been made, but that such person so entitled shall have the same remedy against such person to whom such payment shall be made as he would have had against the trustee, executor, or administrator, if the money had not been paid away under such power of attorney." 957.

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[This provision is extended in the case of payments and acts made and done after the 31st of December, 1881, by stat. 44 & 45 Vict. c. 41, s. 47 (Appendix), which enacts that "(1) Any person making or doing any payment or act, in good faith, in pursuance of a power of attorney, shall not be liable in respect of the payment or act by reason that before the payment or act the donor of the power had died or become lunatic, of unsound mind, or bankrupt, or had revoked the power, if the fact of death, lunacy, unsoundness of mind, bankruptcy, or revocation was not at the time of payment or act known to the person making or doing the same. (2) But this section shall not affect any right against the payee of any person interested in any money so paid; and that person shall have the like remedy against the payee as he would have had against the payer if the payment had not been made by him." 957a.

Stat. 44 & 45  
Vict. c. 41.  
The Convey-  
ancing Act,  
1881.

And with respect to powers of attorney created by instruments executed after the 31st of December, 1882, stat. 45 & 46 Vict. c. 39 (Appendix), enacts by s. 8—

Stat. 45 & 46  
Vict. c. 39.  
The Convey-  
ancing Act,  
1882.

"(1) If a power of attorney, given for valuable consideration, is in the instrument creating the power expressed to be irrevocable, then, in favour of a purchaser, (i.) The power shall not be revoked at any time, either by anything done by the donor of the power without the concurrence of the donee of the power, or by the death, marriage, lunacy, unsoundness of mind, or bankruptcy of the donor of the power; and (ii.) Any act done at any time by the donee of the power, in pursuance of the power, shall be

Effect of  
power of  
attorney, for  
value, made  
absolutely  
irrevocable.

shall be as valid as if anything done by the donor of the power without the concurrence of the donee of the power, or the death, marriage, lunacy, unsoundness of mind, or bankruptcy of the donor of the power, had not been done or happened; and (ii.) Neither the donee of the power nor the purchaser shall at any time be prejudicially affected by notice of anything done by the donor of the power, with or without the concurrence of the donee of the power, or of the death, marriage, lunacy, unsoundness of mind, or bankruptcy of the donor of the power." 957b.

And by s. 9—1. If a power of attorney, whether given for valuable consideration or not, is in the instrument creating the power expressed to be irrevocable for a fixed time therein specified, not exceeding one year from the date of the instrument, then, in favour of a purchaser, i. The power shall not be revoked, for and during that fixed time, either by anything done by the donor of the power without the concurrence of the donee of the power, or by the death, marriage, lunacy, unsoundness of mind, or bankruptcy of the donor of the power; (ii.) Any act done within that fixed time, by the donee of the power, in pursuance of the power, shall be as valid as if anything done by the donor of the power without the concurrence of the donee of the power, or the death, marriage, lunacy, unsoundness of mind, or bankruptcy of the donor of the power, had not been done or happened; and (iii.) Neither the donee of the power, nor the purchaser, shall at any time be prejudicially affected by notice either during or after that fixed time of anything done by the donor of the power during that fixed time, without the concurrence of the donee of the power, or of the death, marriage, lunacy, unsoundness of mind, or bankruptcy of the donor of the power within that fixed time." By the interpretation clause of the Act, the word purchaser is extended, so as to include a mortgagee or lessee. 957c.

[Formerly, in cases in which a deed constituting one of the muniments of title to property, had been executed by an attorney under a power of attorney, the production of the power of attorney, and proof that the donor was alive at the time when the attorney executed the deed, were generally necessary for the verification of the title. And when the power of attorney was not supported by valuable consideration, proof that the power had not been revoked prior to the date of the execution of the deed was also requisite. But now, where a deed is executed by an attorney under a power of attorney coming within section 8 of stat. 45 & 46 Vict. c. 39 (Appendix), the production of the power of attorney is sufficient, as it is immaterial whether the donor is living or not; and this applies also to the case of a power of attorney within section 9 of that Act, when the deed has been executed within the time specified in the power.] **957a.**

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The law as to *Appointments* and *Leases under Powers* has been reserved for Part III., to which it more properly belongs. (See Part III. Tit. 12, Ch. 3. s. 6.)

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## CHAPTER IV.

## OF CHARGES AND LIENS.

## SECTION I.

*Of Charges.*

Pr. II. T. 9, CH. 4, s. 1. **A CHARGE on real or personal estate, is a sum of money payable out of the same. 958.**

Charges defined.

Devise or bequest in trust to pay debts and charges.

Devise or bequest charged with or subject to debts and charges.

Distinction between a charge and an exception, the purposes of which fail.

Where a testator devises an estate or makes a bequest in trust to pay debts and other charges, no beneficial interest passes to the devisee or legatee, but he is a mere trustee for the payment of debts and charges, and, as to the residue, after payment thereof, a trustee for the heir or next of kin. But where property is devised or bequeathed, charged with or subject to debts and other charges, the whole beneficial interest passes to the devisee or legatee, subject only to the payment of the debts and other charges (a). And where real or personal estate is given to a person subject to a charge, and the purposes of the charge fail, the charge sinks into the property for his benefit. But where real estate is devised to a person with an exception, and there is a failure of the purposes to which the excepted property was devoted, such excepted property goes to the heir or residuary devisee, as the case may be (b). **959.**

In the interpretation of wills, favour to creditors has

(a) Story's Eq. Jur. § 1245; 2 Spence's Eq. Jur. 23, n. (b), 226; 1 Rep. Leg. by White, 505, 508; 1 Jarm. Wills, 2nd ed. 476; *Clarke v.*

*Hilton*, L. R. 2 Eq. 810.

(b) *Tucker v. Kayess*, 4 K. & J. 339; *Heptinstall v. Gott*, 2 Johns. & H. 449.

been an acknowledged principle of construction (a). And real estate may be charged by will with the payment of debts, even by a mere expression of an intention that the testator's debts should be paid, without any other indication that they are to be paid out of the real estate, and whether such expression be contained at the beginning of the will, or in any other part. But if a testator directs a particular person to pay, it is natural to presume that the testator intended him to pay out of the funds with which he is entrusted, and not out of other funds over which he has no control; and if the executor is pointed out as the person to pay, that excludes any presumption that other persons not named are to pay, or that the debts are to be paid out of the real estate (b). An exception, however, occurs where a testator charges his executors with the payment of his debts, and devises and bequeaths real and personal estate to them, for he thereby charges his real estate, as well as his personal estate, with the debts (c). 960.

Pr. II. T. 9  
Ch. 4, s. 1.

Indirect  
charge of  
debts.

The effect of a charge of all the testator's debts on his real estate, is to take the real estate out of the operation of the statutes against fraudulent devises and of the stat. 3 & 4 Will. 4, c. 104, which renders real estate liable to the testator's simple contract debts, and to subject it, as equitable assets, to the payment of all debts of whatever degree, *pari passu*, so as to destroy the priority to which specialty debts were entitled under those statutes, before the stat. 32 & 33 Vict. c. 46 (d). 961.

Effect of a  
charge of  
debts.

If a legacy is given generally, the legatee must resort to

Charges of  
legacies.

(a) 2 Spence's Eq. Jur. 327, n. (g);  
1 Rep. Leg. by White, 672.

1st ed. 83, 84; *Cook v. Dawson*, 29  
Beav. 128.

(b) See Story's Eq. Jur., § 1246,  
1247, 1247 a; 2 Spence's Eq. Jur.  
320—322; 6 Cruise T. 38, c. 16,  
§ 7. 8; 1 Rep. Leg. by White, 672;  
2 Jarm. Wills, 2nd ed. 503, 506; 2  
Leading Cases in Equity, by Tudor,

(c) 2 Jarm. Wills, 2nd ed. 508;  
*Harris v. Watkins*, 1 Kay 488;  
*Hartland v. Murrell*, 27 Beav.  
204.

(d) 11 Jarm. & Byth. by Sweet,  
435; 2 Jarm. Wills, 2nd ed. 524—5.

PT. II. T. 2.  
CH. 4, s. 1.

the personal estate only (a). But it may be charged on real estate either expressly or by plain implication (b). Thus, where a testator makes a provision in the same clause for payment of debts and legacies together, the natural inference is, that he intends both to be paid in the same way ; and therefore if the debts are payable out of a mixed fund, so will be the legacies. So when a devise is made in a residuary form, and yet there is no previous devise, legacies are thereby made a charge upon the real estate, as it may be considered that the word residue must mean the residue of the real estate after payment of the legacies thereout. But even where there has been a previous devise, which was sufficient of itself to account for the residuary form of a subsequent devise, it has been held that such residuary form rendered legacies a charge upon the real estate, especially where the executor is the residuary devisee (c). **962.**

A general charge of legacies on real and personal estate, even though expressed to be on "all the testator's estates, of every description, both real and personal," will not render real and personal estate specifically devised or bequeathed liable to pecuniary legacies in case of a deficiency in the personal estate (d): for the specific devisee or legatee is as much an object of the testator's bounty as the pecuniary legatee. And even where real estate is charged it will not be held to be liable until after the general personal estate, which is the natural fund for payment of debts, is exhausted, unless there is an intention

(a) 2 Spence's Eq. Jur. 327, 334, 342.

(b) See 2 Spence's Eq. Jur. 327—329, 342 : 2 Jarm. Wills, 2nd ed. 514; *Cross v. Kennington*, 9 Beav. 150.

(c) 2 Spence's Eq. Jur. 328; 2 Jarm. Wills, 2nd ed. 515, 516; *Francis v. Clemow*, 1 K. & J. 435; *Harris v. Watkins*, 1 K. & J. 438; *Wheeler v.*

*Howell*, 3 K. & J. 198; *Greville v. Browne*, 7 H. L. Cas. 689; *In re Brooke, Brooke v. Rooke*, L. R. 3 Ch. D. 630; *In re Bellis's Trusts*, L. R. 5 Ch. D. 504; *Bray v. Stercus*, L. R. 12 Ch. D. 162.

(d) *Coote Mortg.*, 3rd ed. 476: 6 Cruise T. 38, c. 16, § 21; *Conron v. Conron*, 7 H. L. Cas. 168.

to exonerate the personal estate (*a*): as where nothing is given to the legatee but a sum to be raised out of the real estate, or where a portion of the real estate or its produce is appropriated as a fund for payment of the legacies (*b*). **963.**

Pr. II. T. 9,  
Ch. 4, s. 1.

Where the testator charges his legacies on his real and personal estate, the realty and the personalty bear the charge rateably, according to their relative value; and if some of the legacies fail by lapse or otherwise, so much of the realty as would have been applicable to the payment of the legacies which fail, belongs, if undisposed of, to the heirs, and so much of the personalty as would have been so applicable, to the next of kin (*c*). **964.**

A Court of Equity will in general consider a charge on the rents and profits, to raise portions, legacies, or debts, as a charge on the land, if such charge is not restrained to the annual profits, and will imply a power to sell or mortgage (*d*). **965.**

Charge on  
rents and  
profits, a  
charge on  
the land.

Where a testator simply charges or subjects his real estate with or to the payment of debts, in some cases it has been held that an implied power of selling or mortgaging is vested in the person having the legal estate, while in others it has been held that such a power is vested in the executor in equity, if not at law (*e*). But it was

Implied  
power of  
sale or  
mortgage.

(*a*) 2 Spence's Eq. Jur. 338.

(*b*) 2 Spence's Eq. Jur. 342.

(*c*) 1 Rep. Leg. by White, 680.

(*d*) 2 Spence's Eq. Jur. 406; *Lord Londesborough v. Somerville*, 19 Beav. 295; *Metcalfe v. Hutchinson*, L. R. 1 Ch. D. 591.

(*e*) 1 Cases in Equity, by White & Tudor, 2nd ed. 71—77; Sugd. V. & P., 13th ed. 545 n. (1); Hayes & Jarm.; Concise Forms of Wills, 6th ed., by Mr. T. S. Badger Eastwood, p. 463—8, and a pamphlet by Mr. Joshua Williams on the

Power of an Executor under a Charge of Debts; Story's Eq. Jur. § 1064 b; 2 Sp. Eq. Jur. 367. See *Furber v. Peacock*, 12 Sim. 541; *Shar v. Borrer*, 1 Keen 559; *Ball v. Harris*, 4 My. & Cr. 284; *Gosling v. Carter*, 1 Coll. 644; *Carter v. Fulbrook*, 8 Hare 25, 278; *Doe d. Jones v. Hughes*, 6 Exch. 223; *Robinson v. Lowater*, 5 D. M. & G. 272; *Eidsforth v. Armstead*, 2 K. & J. 233; *Wrigley v. Sykes*, 21 Beav. 237; *Colyer v. Finch*, 5 H. L. Cas. 905, 922—4; *Hodkinson v. Quinn*, 1

Pr. II. T. 9. held by the Lords Justices (a), that where a testator  
 Ch. 4, s. 1. directs his debts to be paid, and then devises real estate,  
 subject to or charged with debts and legacies, the devise  
 explains and controls the charge and power of sale or  
 mortgage created by the first words, so as to vest in the  
 devisee the power of sale or mortgage to pay the debts.  
**966.**

Stat. 22 & 23  
 Vict. c. 35,  
 ss. 14, 15, 16,  
 17, 18.

Devisee in  
 trust may  
 raise money  
 by sale or  
 mortgage,  
 notwith-  
 standing  
 want of  
 express  
 power in the  
 will.

But by the stat. 22 & 23 Vict. c. 35, "where by any will  
 which shall come into operation after the passing of this  
 Act the testator shall have charged his real estate or any  
 specific portion thereof with the payments of his debts, or  
 with the payment of any legacy or other specific sum of  
 money, and shall have devised the estate so charged to any  
 trustee or trustees for the whole of his estate or interest  
 therein, and shall not have made any express provision for  
 the raising of such debt, legacy, or sum of money out of  
 such estate, it shall be lawful for the said devisee or  
 devisees in trust, notwithstanding any trusts actually  
 declared by the testator, to raise such debts, legacy, or  
 money as aforesaid, by a sale and absolute disposition by  
 public auction or private contract of the said hereditaments  
 or any part thereof, or by a mortgage of the same, or partly  
 in one mode and partly in the other; and any deed or  
 deeds of mortgage so executed may reserve such rate of  
 interest and fix such period or periods of repayment as  
 the person or persons executing the same shall think  
 proper" (s. 14). **967.**

Powers  
 given by  
 last section  
 extended to  
 those who  
 succeed to  
 the trustee-  
 ship.

"The powers conferred by the last section shall extend  
 to all and every person or persons in whom the estate  
 devised shall for the time being be vested by survivorship,  
 descent, or devise, or to any person or persons who may  
 be appointed under any power in the will, or by the Court

Johns. & Hem. 308; *Cook v. Dawson*,  
 29 Beav. 123; *Greetham v. Colton*,  
 34 Beav. 615.

(a) *Corser v. Cartwright*, L. R.  
 8 Ch. Ap. 971; affirmed, L. R. 7  
 H. L. 731.



of Chancery, to succeed to the trusteeship vested in such devisee or devisees in trust as aforesaid" (s. 15). **968.**

Pr. II. T. 9.  
Ch. 4, s. 1.

"If any testator who shall have created such a charge as is described in the fourteenth section shall not have devised the hereditaments charged as aforesaid in such terms as that his whole estate and interest therein shall become vested in any trustee or trustees, the executor or executors for the time being named in such will (if any) shall have the same or the like power of raising the said moneys as is hereinbefore vested in the devisee or devisees in trust of the said hereditaments, and such power shall from time to time devolve to and become vested in the person or persons (if any) in whom the executorship shall for the time being be vested; but any sale or mortgage under this Act shall operate only on the estate and interest, whether legal or equitable, of the testator, and shall not render it unnecessary to get in any outstanding subsisting legal estate" (s. 16). **969.**

Executors to have power of raising money, etc., where there is no sufficient devise.

"Purchasers or mortgagees shall not be bound to inquire whether the powers conferred by sections fourteen, fifteen, and sixteen of this Act, or either of them shall have been duly and correctly exercised by the person or persons acting in virtue thereof" (s. 17). **970.**

Purchasers or mortgagees not bound to inquire as to powers.

"The provisions contained in sections fourteen, fifteen, and sixteen shall not in any way prejudice or affect any sale or mortgage already made or hereafter to be made, under or in pursuance of any will coming into operation before the passing of this Act, but the validity of any such sale or mortgage shall be ascertained and determined in all respects as if this Act had not passed; and the said several sections shall not extend to a devise to any person or persons in fee or in tail or for the testator's whole estate and interest charged with debts or legacies, nor shall they affect the power of any such devisee or devisees to sell or mortgage as he or they may by law now do" (s. 18). **971.**

Sections 14, 15, and 16, not to affect certain sales and mortgages, nor to extend to other devises.

Pr. II. T. 9,  
Ch. 4, s. 1.

Mode of  
enforcing a  
trust or  
charge.

Whether real estate is subject to debts or legacies, or both, by way of trust or of charge, or by way of legal power in the nature of a trust, the estate can only be turned into money, and the proceeds distributed, in case of dispute or difficulty, through the agency of a Court of Equity (*a*). 972.

Charge of  
annuities.

Where the estate is charged with annuities, it is not the course to discharge the lands: they will be charged in the hands of a purchaser (*b*). 973.

## SECTION II.

### *Of Liens (c).*

Pr. II. T. 9,  
Ch. 4, s. 2.

Definition.

Two kinds.

Legal.

Equitable.

Liens are either legal or equitable. 974.

A legal lien is the right of a person to retain property of which he has the lawful possession, until a debt due to him has been satisfied (*d*). 975.

An equitable lien is a hold upon property, for the satisfaction of a claim attaching thereto, under an express charge or contract or constructive trust (*e*). 976.

Liens in equity are wholly independent of the possession of the property. 977.

Lien of a  
solicitor for  
costs.

The lien of a solicitor on the deeds, books, and papers of his client, for his costs, is not like a lien arising in the case of contract: it has not the character of a pledge or a mortgage; but it is merely a right to withhold the deeds, books, and papers which have come into his possession as solicitor, and not a right to enforce his claim against the

(*a*) 2 Spence's Eq. Jur. 365.

(*b*) 2 Spence's Eq. Jur. 369.

It may here be mentioned, that estates may be charged for improving lands, under powers in various Acts of Parliament; as to which, see Chitty's Statutes, 4th ed.

(*c*) On this subject the reader is

referred to Coote on Mortgages, 3rd ed., Chap. 15, 19; Smith's Manual of Common Law, 9th ed., and authorities there cited.

(*d*) Sm. Merc. Law, 6th ed. 563, 570; Cross on Lien, 2, 30—8.

(*e*) Smith's Executory Interests annexed to Fearn, § 74.

client. It prevails as against the representatives of the client, but it is only commensurate with the right of the client, and is subject to the rights of third persons as against him. Hence a prior incumbrancer cannot be affected by it; and when a mortgage is paid off, the solicitor of the mortgagee cannot retain the deeds (a). And so where a purchaser makes a mortgage, and afterwards the purchase is completed, and the deeds are delivered to the solicitors of the purchaser, who have no notice of the mortgage, their lien either for their general bill of costs or for their costs relating to the conveyance, cannot prevail against the mortgagee (b). But a solicitor has a lien upon a fund realised in a suit, for his costs of the suit or immediately connected with it; and this is a lien which he may actively enforce (c). A solicitor's lien, however, is not a general lien on a fund in Court, though brought in by his exertions, but only on what, on the issue of the suit may belong to his own client (d). [But it has been decided in recent cases, that the charge to which, by section 28 of the stat. 23 & 24 Vict. c. 127, the Court is empowered to declare a solicitor entitled, upon property recovered or preserved by his instrumentality, in an action, for taxed costs, charges, and expenses of or in reference to the action, extends in the case of a solicitor not a mere volunteer, but bonâ fide employed by some person, to the whole property so recovered or preserved, independently of the questions who the person is to whom such property

PR. II. T. 9.  
CH. 4, S. 2.

(a) 2 Spence's Eq. Jur. 800, 801; *Francis v. Francis*, 5 D. M. & G. 108; *Turner v. Letts*, 7 D. M. & G. 243; see *Watson v. Lyon*, Id. 288; *Ex parte Fuller*, *In re Long*, L. R. 16 Ch. D. 617; *Morgan and Wurtzburg's Law of Costs*.

(b) *Pelly v. Wathen*, 1 D. M. & G. 16.

(c) 2 Spence's Eq. Jur. 802; *Haynes v. Cooper*, 33 Beav. 431; *Shaw v. Neale*, 6 H. L. Cas. 581; *Owen v. Henshaw*, L. R. 7 Ch. D. 385; *Pilcher v. Arden*, *In re Brook*, L. R. 7 Ch. D. Ap. 318.

(d) *Verity v. Wyld*, 4 Drew. 427.

Pr. II. T. 9.  
Ch. 4, s. 2. belongs, or whether the solicitor was employed by that person, or whether that person is an infant (a).] 978.

Lien of a  
joint  
tenant; If one of two joint tenants of a lease renew for the benefit of both, he will have a lien on the moiety of the other joint tenant for a moiety of the fines and expenses (b). 979.

of a trustee; A trustee is entitled to a lien on the trust estate for his expenses (c); [also for the costs and expenses with interest, of the renewal of a lease (d).] 980.

of annuitants. Annuitants scheduled to a trust deed do not acquire any lien upon the trust estate, unless they are made parties to the deed (e). 981.

Liens under  
covenants to  
settle or  
charge. A covenant for valuable consideration, to charge or settle particular lands, or all the present estates of the covenantor, will create a lien on that property. And the parties entitled to the benefit of the covenant take transmissible interests, though they die before the time fixed for the execution of the covenant. And it is the same with a covenant to settle or charge all lands to be acquired during a certain time (f). 982.

(a) *Bonsor v. Bradshaw*, 30 L. J. (Ch.) 159; *Bailey v. Birchall*, 2 H. & M. 371; *Pinkerton v. Easton*, L. R. 16 Eq. 490; *Bulley v. Bulley*, L. R. 8 Ch. D. 479; *Greer v. Young*, L. R. 24 Ch. D. (Ap.) 545; *Charlton v. Charlton*, 31 W. R. 237.

(b) 2 Spence's Eq. Jur. 803; *Ex parte Grace*, 1 B. & P. 576; and see *Saunders v. Dunman*, L. R.

7 Ch. D. 825.

(c) 2 Spence's Eq. Jur. 803.

(d) *Holt v. Holt*, 1 Ch. Cas. 190; and see *Maddy v. Hale*, L. R. 3 Ch. D. (Ap.) 327.

(e) 2 Spence's Eq. Jur. 804.

(f) *Coote Mortg.*, 3rd ed. 227; see also *Mornington v. Keane*, 2 D. & J. 292.

## TITLE X.

OF ABSOLUTE AND DEFEASIBLE INTERESTS ; AND PARTICULARLY OF INTERESTS BY WAY OF SECURITY.

### CHAPTER I.

OF ABSOLUTE AND DEFEASIBLE INTERESTS.

ABSOLUTE interests (as opposed not to limited or partial interests, but to defeasible interests) are interests which are not created as securities, nor subject, by the terms in which they are limited, to any liability to determine at all, or not before the time when they would expire by force of the general limitation, express or implied (a). **983.**

PART II.  
T. 10, CH. I.

Definition  
of absolute  
interests.

Defeasible interests are interests which are created as securities, or are liable to be divested by an action, or are subject, by the terms in which they are limited, to a liability to determination, before the time when they would expire by force of the general limitation, express or implied (a). **984.**

Definition of  
defeasible  
interests.

These are of several kinds :—1. An interest which is subject to an express condition subsequent properly so called, or to a defeasance (b). 2. An interest which is subject to a mixed condition (c). 3. An interest which is subject to a special or collateral limitation (a). 4. An interest under a limitation in default of appointment, which confers a vested interest, subject to be divested by an appointment. 5. Interests gained by abatement, intrusion, disseisin, discontinuance, and deforcement, where the rightful owner has a right of action for recovery of his estate (d). 6. Interests by way of security. **985.**

Their  
several  
kinds.

(a) See par. 164, *supra*.

(c) See par. 157, *supra*.

(b) See par. 154, *supra*.

(d) See *infra*, Part 3 Tit. 6, Ch. 1.

## CHAPTER II.

## OF MORTGAGES (a).

PART II.  
T. 10, CH. 2.

Definition.

A LEGAL mortgage is a security created by means of a transfer, by a debtor to his creditor, of the legal ownership of real or personal estate, subject to be defeated on the discharge of the debt. 986.

Mortgage in form of an absolute conveyance or assignment.

A deed, if really intended as only a security for money, will be treated as a mortgage, although in form it purports to be an absolute conveyance or assignment; and even parol evidence is admissible to show the intention of the parties (b). 987.

Mortgage by way of trust for sale.

Where land is conveyed on trust, in case a sum and interest should not be paid by a day named, to sell, and after payment of principal, interest, and costs, to pay over the surplus and reconvey the unsold part of the estate, and the grantee covenants not to sell without giving six months' notice, and the grantor covenants to pay the debt and interest, but there is no proviso for redemption; this is a mere mortgage, and the grantor is entitled to six months' time to redeem (c). 988.

Welsh mortgage.

There is a kind of mortgage called a Welsh mortgage, which, however, has now fallen into disuse, in which there is no condition or proviso for repayment at any time. The

(a) The reader is referred generally to the late Mr. Coote's most learned, elaborate, and valuable work, the third edition of which was edited by him and his son, the late Mr. Richard Coote,—a gentleman peculiarly qualified for such a laborious and difficult work. See also 5 Jarm. & Byth. by Sweet; and

Co. Litt. 205 a, n. (1), 208 a, n. (1); Fisher on Mortg.

(b) Coote on Mortg., 3rd ed. 12, 13; *Gardner v. Cazenove*, 1 Hurl. & Norm. 423; and see *infra*, par. 1058.

(c) *Bell v. Carter*, 17 Beav. 11; *In re Alison, Johnson v. Mounsey*. L. R. 11 Ch. D. (Ap.) 284.

agreement is, that the mortgagee, to whom the estate is conveyed, shall receive the rents till his debt is paid, and in such case the mortgagor and his representatives are at liberty to redeem at any time (a). **989.**

PART II.  
T. 10, CH. 2.

There is also a species of transaction which bears some resemblance to a mortgage, but yet is very different. It consists of an absolute *bonâ fide* sale and conveyance, with a collateral agreement for repurchase and reconveyance on repayment of the purchase money; and such collateral agreement may either be introduced into the agreement for sale at the time, or may be made at a subsequent period (b). Of this class is an agreement for the purchase of the equity of redemption, entered into *bonâ fide* and subsequently to a mortgage made without reference to any such agreement. Of the same nature is a release of the equity of redemption, with a collateral agreement to reconvey on payment of the purchase money (c). But where an agreement for a repurchase is contemporaneous with the agreement for purchase, the transaction will usually be treated as a mortgage; repurchase being regarded as meaning redemption (d). **990.**

Purchase  
with right  
of repur-  
chase.

If the money paid by the grantee would be a grossly inadequate price for the absolute purchase of the estate; if he was not let into immediate possession of the estate; if he accounted for the rents to the grantor, and only retained an amount equivalent to interest; or if the expense of preparing the deed of conveyance was borne by the grantor; each of the circumstances has been considered as evidence, showing, with more or less cogency, that the conveyance was intended merely by way of security (e). **991.**

(a) 2 Spence's Eq. Jur. 616.

(b) 2 Spence's Eq. Jur. 619, 621; Coote Mortg., 3rd ed. 14.

(c) Coote Mortg., 3rd ed. 14.

(d) 2 Spence's Eq. Jur. 621, note (a); Coote Mortg., 3rd ed. 17. But see *Alderson v. Whitv.* 2 D. & J. 97.

(e) 2 Spence's Eq. Jur. 620, 622.

PART II.  
T. 10, CH. 2.

A conveyance will not be deemed a mortgage or held to be a security only, though it be for an undervalue, if it is not so gross as to show that necessity or pressure amounting to fraud could alone have induced the grantor to enter into such a contract, and though the purchaser afterwards declares that he will take the money given as the consideration at any time, with damages for it, or the like ; for if it is not a mortgage in the first instance, it would not be so by parol agreement afterwards (a). 992.

Where the transaction is clearly one of purchase with a right of repurchase, the time limited ought precisely to be observed ; and there is no principle on which the Court can relieve, if it is not so observed (b). 993.

Where the transaction is one of repurchase, and not of redemption, if the purchaser dies seised, and then the right of repurchase is exercised, the money will go to the real representatives, and not to the personal representatives, as it would in the case of a mortgage (c). 994.

If a transaction is to be considered in the light of a mortgage as to one party, it must as regards the other (d). 995.

Sale.

[By virtue of stat. 44 & 45 Vict. c. 41, s. 25 (Appendix), a sale may be directed in any action, whether for foreclosure, or for redemption, or for sale, or for the raising and payment in any manner of mortgage money.] 995a.

## SECTION I.

### *Of Legal Mortgages of Real Property.*

Pr. II. T. 10,  
CH. 2, s. 1.

I. What  
may be  
mortgaged

I. Generally, every description of property, and every kind of interest in it, which is capable of absolute sale, may be the subject of a legal mortgage or its equivalent

(a) 2 Spence's Eq. Jur. 622, 623.

(b) 2 Spence's Eq. Jur. 623 ; Coote Mortg., 3rd ed. 14.

(c) 2 Spence's Eq. Jur. 624.

(d) 2 Spence's Eq. Jur. 623 ; Coote Mortg., 3rd ed. 19.



in equity (a). Rectories impropriate in lay hands are subject to the like mode of mortgage as any other species of real estate (b). And the stat. 1 & 2 Vict. c. 106, authorises the bishop, on the avoidance of a benefice not having a fit house of residence, to raise money for building a residence, by mortgage of the glebe, tithes, rents, and profits, and prescribes a form of mortgage (c). 996.

Pr. II. T. 10.  
CH. 2, s. 1.

II. 1. So long as the mortgagor remains in possession, the mortgagee's estate is not absolute even at law. For by stat. 15 & 16 Vict. c. 76, ss. 219, 220, if an ejectment be brought by the mortgagee, and no suit be pending in any Court of Equity for redemption or foreclosure, the payment of principal, interest, and costs shall, except in certain cases, be deemed a satisfaction of the mortgage, and the Court may compel the mortgagor to reconvey the estate (d). But when the mortgagor has ceased to be in possession, and there has been a default in payment of the money at the stipulated time, the estate of the mortgagee becomes absolute at law. Yet his estate is in equity treated as a mere security for the principal and interest and costs properly incurred in relation to the mortgage, and follows the nature of the debt. [And although, where the mortgage was in fee, the legal estate formerly descended to the heir of the mortgagee, yet, in equity, it was deemed a chattel interest and personal estate, and belonged to the personal representatives as assets (e). 997.

II. Mortgagee's estate, rights, and remedies.  
1. Mortgagee's estate.

But now in cases of death after the 31st of December, 1881, it is enacted by stat. 44 & 45 Vict. c. 41, s. 30 (Appendix), that, "Where an estate or interest of inheritance, or limited to the heir as special occupant, in any tenements or hereditaments, corporeal or incorporeal, is vested on any

Stat. 44 & 45  
Vict. c. 41.  
The Conveyancing and Law of Property Act, 1881.  
Devolution of trust and

(a) 2 Spence's Eq. Jur. 614 ;  
Coote Mortg., 3rd ed. 101.

(b) Coote Mortg., 3rd ed. 208.

(c) Coote Mortg., 3rd ed. 208.

(d) The stat. 7 Geo. 2, c. 20, ss. 1.  
3, contains similar provisions.

(e) Coote Mortg., 3rd ed. 539 ; 2  
Spence's Eq. Jur. 296.

Pr. H. T. 10,  
Ch. 2, s. 1.

mortgage  
estates on  
death.

[trust, or by way of mortgage, in any person solely, the same shall, on his death, notwithstanding any testamentary disposition, devolve to and become vested in his personal representatives or representative from time to time, in like manner as if the same were a chattel real vesting in them or him ; and accordingly all the like powers, for one only of several joint personal representatives, as well as for a single personal representative, and for all the personal representatives together, to dispose of and otherwise deal with the same, shall belong to the deceased's personal representatives or representative from time to time, with all the like incidents, but subject to all the like rights, equities, and obligations, as if the same were a chattel real vesting in them or him ; and, for the purposes of this section, the personal representatives, for the time being, of the deceased, shall be deemed in law his heirs and assigns, within the meaning of all trusts and powers."'] **997a.**

2. Mort-  
gagee's  
rights.  
Possession,  
waste,  
leases, rent

2. The mortgagee is entitled to enter into possession of the lands, and, after notice to the tenants, to recover the rents and profits, unless there is some agreement to the contrary ; and if the security is insufficient, he may fell timber, and sell it, and open mines, and apply the produce towards the liquidation of his debt ; but, with this exception, he may not commit waste. He may grant leases, subject to the equity of redemption, and avoid, by ejectment, without notice, any leases that have been made by the mortgagor, without his concurrence, subsequently to his mortgage. He must, however, account for the rents he receives, or but for his wilful default might have received, and pay an occupation-rent for such part as he may keep in his own possession (a). **998.**

(a) Story's Eq. Jur. § 1016, 1016 b ; 2 Spence's Eq. Jur. 642, 645, 646, 648 ; Coote Mortg., 3rd ed. 332, 334, 344 ; 3 Jarm. & Byth. by Sweet, 37 ; *Millett v. Darcy*, 31

Beav. 470 ; 2 Tudor Eq. Cas., 3rd ed. 975 ; Seton's Decrees, 3rd ed. 382 ; *Parkinson v. Hanbury*, L. R. 2 H. L. 1.

If there are two independent tenements, the mortgagee may take possession of one of them only, so as to become liable to account for default as to that alone. And so, if part only of the property (as the land without the shooting or the timber) is in lease, the mortgagee may by taking the rent make himself accountable for that alone (a). **998a.**

Pr. II. T. 10.  
Ch. 2, s. 1.

Where persons, who though, in fact, mortgagees, enter into possession of the rents and profits in another character (e.g., as purchasers), they are not answerable for what, without their wilful default, they might have received (b). **999.**

In the absence of an apparent intention to the contrary, fixtures, though put up by the mortgagor, not to improve the inheritance, but simply for the purpose of carrying on the business for which the premises are used, and though put up since the date of the mortgage, and capable of being removed without any appreciable damage to the freehold, pass under a mortgage of the freehold to the mortgagee (c). **1000.**

In the case of a lease made prior to the mortgage, although it is not strictly necessary, yet in order to afford evidence of the tenant's admission of a notice to pay rent to the mortgagee, the tenant sometimes signs an acknowledgment of attornment, that is, of consent to the change of ownership: and sometimes he attorns or consents without any notice. And if a mortgagee does not wish to disturb the possession of a lessee under a lease made subsequent to the mortgage, sometimes the lessee attorns to the mortgagee at the rent reserved by the lease, in order to

Attorn-  
ment.

(a) *Simmins v. Shirley*, L. R. 6 Ch. D. 173.

(b) *Parkinson v. Hanbury*, L. R. 2 H. L. 1.

(c) *Calwick v. Swindell*, L. R. 3 Eq. 249; *Clinnie v. Wood*, L. R. 4 Exch. (Ex. Ch.) 328. As to certain

articles of machinery, see *Ex parte Astbury*, L. R. 4 Ch. Ap. 630; *Longbottom v. Berry*, L. R. 5 Q. B. 123; *Mather v. Fraser*, 2 K. & J. 536; *Holland v. Hodgson*, L. R. 7 C. P. (Ex. Ch.) 328.

Pr. II. T. 10,  
Ch. 2, s. 1.

create a tenancy with the mortgagee, and to enable him to distrain for the rent (a). And where the mortgagor himself is in possession, he sometimes attorns and becomes tenant to the mortgagee at a rent equal to the amount of the interest, with an addition sufficient to cover the expense of insuring the buildings (b). 1001.

Limit to  
mortgagee's  
advantage.

A mortgagee is not allowed to obtain any advantage out of the security beyond his principal and interest (c). 1002.

Conversion  
of interest  
into  
principal.

By the old law, before the abolition of the law against usury, by the stat. 17 & 18 Vict. c. 90 (even if he may do so by the present law), a mortgagee could not, at the time of the mortgage, stipulate, that if the interest be not paid at the time, it shall be converted into principal (d). To convert interest into principal, the interest must first become due, and then there must be an agreement in writing signed, to make it principal, at least so as to affect the estate; and the interest cannot even then be turned into principal to the prejudice of subsequent incumbrances of which the mortgagee has notice at the time of the agreement (e). 1003.

But in *Clarkson v. Henderson*, L. R. 14 Ch. D. 348, it was held that reversioners of personalty might, on a mortgage of it, agree to pay 6 per cent. interest, and might stipulate that if the interest were in arrear it should be capitalized, and bear interest after the same rate. 1003a.

Increase of  
interest on  
default in  
regular  
payment.

If a certain rate of interest is reserved, an agreement, that if such interest be not punctually paid, a higher rate of interest shall be payable, is in the nature of a penalty, against which the Court will relieve. But the same object may be attained by reserving the higher rate, and provid-

(a) 3 Jarm. & Byth. by Sweet, 37.  
As to attornment, see Part III. T.  
10, Ch. 1.

(b) 3 Jarm. & Byth. by Sweet,  
44.

(c) Coote Mortg., 3rd ed. 12, 430.

(d) 2 Spence's Eq. Jur. 628;  
Coote Mortg., 3rd ed. 430—1.

(e) 2 Spence's Eq. Jur. 656;  
Coote Mortg., 3rd ed. 431.

ing for an abatement in the event of punctual payment (a). Pr. II. T. 10.  
Ch. 2, s. 1.  
**1004.**

Interest is payable *de die in diem*, and must therefore be apportioned. The consequence is, that if a tenant for life of a sum of money secured by mortgage dies within a current half-year, his executors will be entitled to the interest up to the day of his death (b). **1005.**

By the stat. 3 & 4 Will. 4, c. 27, s. 42, "no arrears of rent or of interest in respect of any sum of money charged upon or payable out of any land or rent, or in respect of any legacy, or any damages in respect of such arrears of rent or interest, shall be recovered by any distress, action, or suit, but within six years next after the same respectively shall have become due, or next after an acknowledgment of the same in writing shall have been given to the person entitled thereto, or his agent, signed by the person by whom the same was payable, or his agent : provided nevertheless, that where any prior mortgagee or other incumbrancer shall have been in possession of any land, or in the receipt of the profits thereof, within one year next before an action or suit shall be brought by any person entitled to a subsequent mortgage or other incumbrance on the same land, the person entitled to such subsequent mortgage or incumbrance may recover in such action or suit the arrears of interest which shall have become due during the whole time that such prior mortgagee or incumbrancer was in such possession or receipt as aforesaid, although such time may have exceeded the said term of six years." But by the stat. 3 & 4 Will. 4, c. 42, s. 3, an action of covenant or debt upon any bond or specialty [might] be brought within twenty years after the cause of such action or suit. **1006.**

(a) Coote Mortg., 3rd ed. 440; 2 Spence's Eq. Jur. 631. As to the validity of an agreement for making a larger amount of principal pay-

able in default of punctual payment, see *Thompson v. Hudson*, L. R. 2 Eq. 612; 2 Ch. Ap. 285.

(b) Coote Mortg., 3rd ed. 442.

Pr. II. T. 10,  
Ch. 2, s. 1.

[The period of twenty years, prescribed by stat. 3 & 4 Will. 4, c. 42, s. 3, is, with respect to mortgages of real property, now reduced to twelve years by stat. 37 & 38 Vict. c. 57, s. 8 (Appendix), which has been held to apply to the case of a collateral bond for securing payment of a mortgage debt.] Lord St. Leonards remarks, with respect to the two Acts mentioned in the preceding paragraph, that "the construction is, by reconciling the two provisions, to consider the first Act as applicable only to the land, and the latter as applicable only to the person." Arrears are no longer a charge on the land, beyond six years, except in cases of trust, but they may be recovered against a covenantor for [twelve] years (a). 1007.

Leases to  
the mort-  
gagee.

Leases made by the mortgagor to the mortgagee at a rent are looked upon with great suspicion, as likely to have originated in the mortgagee's having taken advantage of the necessities of the mortgagor to obtain a lease upon terms upon which the property would not have been let except for those necessities (b). 1008.

What mort-  
gagee may  
add to his  
debt.

A mortgagee in possession has a right to add to his debt any sums he may be compelled to pay for arrears of rent, or for maintaining the title to the estate, or for rebuilding the premises, or for necessary repairs, or the expenses of collecting the rents or renewing a renewable leasehold, with interest from the time the sums were advanced. But the mortgagee not being allowed any advantage beyond his principal and interest, he cannot by contract or otherwise entitle himself to make any charge for management (c). Hence also he is not allowed to make any charge as receiver if he himself has personally received the rents, even though it may have been agreed that he should be paid for his

Charge for  
manage-  
ment.

Allowance  
for receive

(a) See stat. 37 & 38 Vict. c. 57, s. 8, in Appendix; *Sutton v. Sutton*, L. R. 22 Ch. D. (Ap.) 511; *Fearnside v. Flint*, L. R. 22 Ch. D. 579; Lord St. Leonards on the Statutes,

2nd ed. 147—8.

(b) 2 Spence's Eq. Jur. 632.

(c) 2 Spence's Eq. Jur. 649, 650, 653; Coote Mortg., 3rd ed. 343—4.

trouble in receiving them, and though a receiver might have been employed at the expense of the mortgagor. And before the date of the stat. 23 & 24 Vict. c. 145, s. 17 (a), and independently of any express agreement, it was only where the owner himself, in the ordinary course of management, would have had to employ one, that the mortgagee was entitled to employ a bailiff or receiver, unless with the sanction of the mortgagor (b). 1009.

Pr. II. T. 10.  
Ch. 2, s. 1.

A mortgagee of a West India estate may stipulate that the consignments shall be made to him. And, if out of possession, he may take a certain reward for the management of the estate, provided he do not make that employment a condition. But when he takes possession, he is not at liberty to charge the mortgagor, whom he has ousted, for the trouble he takes on his own account; and he cannot charge or stipulate for commission on consignments, insurance, and the like, but stands in the position of a mortgagee in possession of an English estate (c). 1010.

Mortgage of  
West India  
estate.

As a mortgagee is not allowed any advantage beyond securing his principal and interest, where an advowson is mortgaged, and the living becomes vacant prior to the foreclosure, the mortgagee is compellable in equity to present the nominee of the mortgagor; even although nothing but the advowson be mortgaged, and the deed contain a covenant that on any avoidance the mortgagee shall present. But he may pray a sale of the advowson (d). 1011.

Mortgage of  
an advow-  
son.

The mortgagee may stipulate for the option of pre-emption, in case the mortgagor should determine to sell (e). 1012.

Pre-emption.

[By the old law] a mortgagee is not bound to produce his mortgage deed, or indeed, any of the deeds in his posses-

Production  
and inspection  
of deeds

(a) Now repealed by stat. 44 & 45 Vict. c. 41. See *infra*, par. 1040.

(b) 2 Spence's Eq. Jur. 807.

(c) 2 Spence's Eq. Jur. 630; Coote Mortg., 3rd ed. 343.

(d) Coote Mortg., 3rd ed. 33, 367; 2 Spence's Eq. Jur. 629; 3 Cruise T. 21, c. 2, § 35.

(e) 2 Spence's Eq. Jur. 631; Coote Mortg., 3rd ed. 14.

Pr. II. T. 10,  
Ch. 2, s. 1.

by a mort-  
gagee.

Stat. 44 & 45  
Vict. c. 41,  
s. 16.  
The Con-  
veyancing  
and Law of  
Property  
Act, 1881.

Right of  
mortgagee  
to devise the  
property.

Mortgagee  
ejecting or  
refusing  
tenant.

Priority.

sion, to the mortgagor or any person claiming under him, until payment of the principal and interest due and his costs, though the application be made *bonâ fide*, only to obtain information with a view to paying off the mortgage (a). [But with respect to mortgages made after the 31st of December, 1881, it is enacted by stat. 44 & 45 Vict. c. 41, s. 16 (Appendix), that, "A mortgagor, as long as his right to redeem subsists, shall, by virtue of this Act, be entitled from time to time, at reasonable times, on his request, and at his own cost, and on payment of the mortgagee's costs and expenses in this behalf, to inspect and make copies or abstracts of or extracts from the documents of title relating to the mortgaged property in the custody or power of the mortgagee." And this provision applies notwithstanding any stipulation to the contrary.] 1013.

As an incident to the right of a mortgagee, he [was, under the old law, at liberty to devise the legal estate in the mortgaged property to trustees, if he thought fit, instead of allowing it to descend to his heir at law; and the mortgagor must have borne the costs of obtaining a reconveyance, although they were increased by such devise. But now by virtue of stat. 44 & 45 Vict. c. 41, s. 30 (Appendix), in cases of death after the 31st of December, 1881, the legal estate, notwithstanding any testamentary disposition by the mortgagee, devolves to and becomes vested in his personal representatives or representative from time to time, like a chattel real vesting in them or him (b).] 1014.

If a mortgagee in possession turns out or refuses to accept a responsible tenant, he is liable for any loss occasioned thereby (c). 1015.

Both at law and in equity, in the absence of particular circumstances, statutes, judgments, and recognisances, all

(a) 2 Spence's Eq. Jur. 655; see *supra*, par. 997a.  
Coote Mortg., 3rd ed. 345, 368.

(c) 2 Spence's Eq. Jur. 806.

(b) 2 Spence's Eq. Jur. 669; and



rank according to their dates (a). And so in equity do equitable charges of every kind, where the equities are equal in all other respects than that of priority of time (b). And where money is lent on an equitable mortgage, without notice of a prior equitable agreement affecting the same property, the lender gains no priority over the party claiming under the prior equitable agreement, by getting in the legal estate, at least after he has notice of the circumstances (c). But if a third incumbrancer, by mortgage, without notice of a second incumbrance at the time of lending his money, purchases the first legal mortgage, judgment, statute, or recognisance, even after notice of the second mortgage, so as to acquire the legal title, and holds both securities in his own right, equity will tack both incumbrances together in his favour; so that the second mortgagor will not be permitted to redeem the first, without redeeming the third also; on the principle, that where the equities are equal, the law shall prevail. But if a puisne creditor, by judgment, statute, or recognisance, buys in a prior mortgage, he will not be allowed to tack his judgment to such mortgage, so as to cut out or postpone a mesne mortgage; because he did not originally advance his money on the immediate credit of the land, and by his judgment, he did not acquire any right in the land, but before the statute 1 & 2 Vict. c. 110, only a lien on the land, which might or might not be enforced on it (d); although now, under the 13th section of that Act, a judgment will operate as a charge on real estate, except as

PT. II. T. 10,  
CH. 2, s. 1.

Tacking.

(a) 2 Spence's Eq. Jur. 727; Coote Mortg., 3rd ed. 410.

(b) 2 Spence's Eq. Jur. 727—732; *Shropshire Union Rys. &c. Co. v. The Queen*, L.R. 7 H. L. 496; Coote Mortg., 3rd ed. 410; remarks of V.-C. *Kindersley* in *Rice v. Rice*, 2 Drewry 78; *Cory v. Eyre*, 1 D. J. & S. 149.

(c) *Mumford v. Stohwasser*, L. R. 18 Eq. 556.

(d) See Story's Eq. Jur. § 412—416, 418, 421; 2 Spence's Eq. Jur. 734, 735, 737, 740; Coote Mortg., 3rd ed. 209, 210, 383, 385, 389, 403, 407, 408; *Spencer v. Pearson*, 24 Beav. 266; but see 2 Spence's Eq. Jur. 722, 723.

Pr. II. T. 10,  
Ch. 2 s. 1. regards purchasers, mortgagees, or creditors, who became such before the time for the commencement of the Act, and except so far as the stat. 23 & 24 Vict. c. 38, s. 1, and 27 & 28 Vict. c. 112, affect the case. 1016.

Upon the principle, that where the equities are equal, the law shall prevail, if a first mortgagee, who has the legal estate, or the better right to call for it, lends to the mortgagor a further sum on another mortgage, or on a statute or judgment, or even if he lends a further sum on note, and it is distinctly agreed at the time to be on the security of the mortgaged property, he is entitled to retain till both sums are paid, as against a mesne mortgage, of which he had no notice at the time of the further advance (a). Indeed, it may be stated more generally, that if a mortgagee has the legal estate, and makes a further advance, without notice of any claim adverse to his title, he is entitled to tack the further advance to the original mortgage as against any such adverse claim (b). But where a first mortgage extends to future advances, further advances made by the first mortgagee after notice of the second mortgage, or after notice of a sale of the equity of redemption by the mortgagor, have no priority over such second mortgagee or purchaser, even though the second mortgagee or purchaser had notice of the nature of the first mortgage (c). And if a transferee of a first mortgage advances a further sum, he cannot tack it as against an equitable mortgage subsequent to the original first mortgage, of which equitable mortgage the original first mortgagee had notice, though the transferee had no notice of it (d). 1017.

(a) Story's Eq. Jur. § 417, and note; 2 Spence's Eq. Jur. 721, 735, 739; Coote Mortg., 3rd ed. 409, 410; *Tassell v. Smith*, 2 D. & J. 713.

(b) *Young v. Young*, L. R. 3 Eq. 801.

(c) *Rolt v. Hopkinson*, 25 Beav. 461; 3 D. & J. 177; 9 H. L. Cas.

514; *London & County Banking Co. v. Ratcliffe*, L. R. 6 Ap. Cas. 722; *Menzies v. Lightfoot*, L. R. 11 Eq. 459.

(d) *Pearce v. Jackson*, L. R. 3 Ch. Ap. 576. See *Baker v. Gray*, L. R. 1 Ch. D. 491.

A statute or judgment creditor who is the first incumbrancer, cannot, by buying a subsequent mortgage, tack it to his statute or judgment, because he did not advance his money on the immediate credit of the land (*a*). And a prior mortgagee, having a bond debt (which per se is not a charge on land), whether prior or subsequent to his mortgage, cannot tack it against any intervening incumbrancer of a superior rank between his bond and mortgage, or against other creditors, or even against the mortgagor himself, or a purchaser of the equity of redemption, but only (to avoid circuity of action) against the heir or beneficial devisee, if in the bond the heirs were expressly bound (*b*). And as copyholds, prior to the stat. 1 & 2 Vict. c. 110, were not liable at law to an extent, a judgment debt cannot be tacked to a mortgage of copyhold land (*c*). 1018.

Pr. II. T. 10,  
Ch. 2, s. 1.

By the stat. 37 & 38 Vict. c. 78, s. 7, "After the commencement of this Act, no priority or protection shall be given or allowed to any estate, right, or interest in land by reason of such estate, right, or interest being protected by or tacked to any legal or other estate or interest in such land; and full effect shall be given in every court to this provision, although the person claiming such priority or protection as aforesaid shall claim as a purchaser for valuable consideration and without notice: Provided always, that this section shall not take away from any estate, right, title, or interest any priority or protection which but for this section would have been given or allowed thereto as against any estate or interest existing before the commencement of this Act." But this was repealed by the stat. 38 & 39 Vict. c. 87, as from the date of operation, "except as to anything duly done thereunder before the commencement of this Act." 1019.

(*a*) 2 Spence's Eq. Jur. 740.

Coote Mortg., 3rd ed. 393.

(*b*) Story's Eq. Jur. § 418; 2  
Spence's Eq. Jur. 723—725, 735;

(*c*) Coote Mortg., 3rd ed. 389.

Pr. II. T. 10,  
Ch. 2, s. 1.

When a puisne mortgagee has bought in a prior incumbrance, but the legal estate is vested in a trustee, or the puisne mortgagee has not obtained the legal title, or he takes in autre droit, the incumbrances are paid in the order of their priority in point of time, according to the maxim, *Qui prior est tempore, potior est in jure*, and the principle that he who has the better right to call for the legal title, or for its protection, shall prevail (a). 1020.

Where a legal mortgage is executed, and is registered (in Ireland), and the mortgagor assigns an apparently satisfactory reason for not handing over or producing the title deeds to the mortgagee, the legal mortgage will not be postponed to a prior equitable unregistered mortgage, of which the legal mortgagee had no knowledge or notice (b). 1021.

Postponement of a prior mortgage, independently of tacking.

Where a first mortgagee voluntarily, distinctly, and unjustifiably, through fraud or gross negligence, allows the mortgagor to retain the title deeds, or allows the mortgagor to get possession of them, he will be postponed to a subsequent mortgagee or purchaser, without notice of the prior mortgage. But the onus of proving this fraud or gross negligence is on the person seeking to postpone the other (c). If a person taking a legal mortgage leaves the deeds with the mortgagor, not through neglect or fraud, but with the intent of enabling him to raise a specific sum which is to take precedence of the legal mortgage, such legal mortgagee cannot, as against the subsequent mortgagees, complain, or assert his priority, if, instead of that sum, the mortgagor raises a much larger sum; because he has himself put it into the power of the

(a) Story's Eq. Jur. § 419; 2 Spence's Eq. Jur. 745.

(b) *Agra Bank v. Barry*, L. R. 7 H. L. 135.

(c) Story's Eq. Jur. § 393; and see § 1010; 2 Spence's Eq. Jur. 766, 767; *Finch v. Shaw*, 19 Beav. 500;

S. C. nom. *Colyer v. Finch*, 5 H. L. Cas. 905; *Carter v. Carter*, 3 K. & J. 617, 646—8; *Espin v. Pemberton*, 4 Drewry 333; *Dowles v. Saunders*, 2 Hem. & Mill. 242; *Layard v. Maud.* L. R. 4 Eq. 397; *Briggs v. Jones*, L. R. 10 Eq. 92.

mortgagor to raise any sum the mortgagor pleases (a). But <sup>Pr. II. T. 10,  
Ch. 2, s. 1.</sup> if a mortgagor delivers to a person to whom he has made a legal mortgage, a parcel of deeds, which by an endorsement purports to contain the title deeds of the mortgaged property, and the mortgagee does not open the parcel to ascertain whether it did contain those deeds, and the mortgagor afterwards sells and conveys the property to a purchaser, the neglect of the mortgagee to ascertain whether the parcel did contain the deeds is not such negligence as to constitute a ground of postponing the mortgagee, who had the legal estate, to the purchaser (b). If a first mortgagee conceals his mortgage from a person who, as he knows, is about to lend money to the mortgagor, he will be postponed to such person (c). And if a prior incumbrancer on real estate devised in trust for sale omits to give notice to the trustee before notice is given of a subsequent incumbrance, he will be postponed to the subsequent incumbrancer (d). But a mortgagee of an equitable estate in land not directed to be sold has no occasion to give notice to the trustees, either to complete his title as against his mortgagor, or to secure to himself his priority against subsequent incumbrancers (e). A declaration of trust of an outstanding term, accompanied by a delivery of the deeds creating and continuing the term, has been held to give a subsequent incumbrancer a better equity than a mere declaration of trust taken by a prior incumbrancer (f). And if the first incumbrancer has a declaration of trust only by the borrower, and none by

(a) *Perry Herrick v. Attwood*, 25 Beav. 205; 2 D. & J. 21. See also *Lloyd v. Attwood*, 3 D. & J. 614.

(b) *Hunt v. Elmes*, 28 Beav. 631; 2 D. F. & J. 578. See also *Ratcliffe v. Barnard*, L. R. 6 Ch. Ap. 652.

(c) Story's Eq. Jur. § 390; 2 Spence's Eq. Jur. 732, 766; Coote Mortg., 3rd ed. 415; *Wilson v. Wil-*

*son*, L. R. 14 Eq. 32.

(d) *Lee v. Howlett*, 2 K. & J. 531; *Consolidated Investment Insurance Comp. v. Riley*, 1 Gif. 371.

(e) 2 Spence's Eq. Jur. 764; Coote Mortg., 3rd ed. 210, 416; *Rooper v. Harrison*, 2 K. & J. 86.

(f) Story's Eq. Jur. § 421 b, and note; 2 Spence's Eq. Jur. 729.

Fr. II. T. 10, the trustee, and the second incumbrancer has a formal  
 CR. 2, s. 1. mortgage of the equity of redemption, and the trustee is a party to that deed, and declares himself to be a trustee for the second incumbrancer, the second will have a better equity to call for the legal estate than the first (a). 1022.

A charge created by an infant (whether representing himself to be an adult or otherwise), will be postponed to a subsequent mortgage executed by him when of full age, to a mortgagee without notice (b). 1023.

Right of  
 mortgagees  
 from trustee  
 of a com-  
 pany.

A company ought not to issue certificates of stock to their own trustee. But at the same time a person before taking a mortgage thereof ought to ascertain that the person mortgaging has the right to mortgage. If he does not, he cannot enforce his claim against the original cestuis que trust (c). 1024.

Mortgagee's  
 remedies.  
 Foreclosure

3. As to the remedies to secure the discharge of the mortgage, where there is no power of sale in the deed, a bill for a foreclosure is, in common cases, deemed the appropriate and exclusive remedy (d); but by the stat. 15 & 16 Vict. c. 86, s. 48, on a foreclosure suit being instituted, the Court may now direct a sale. [This section is now repealed by stat. 44 & 45 Vict. c. 41, s. 25 (Appendix), which substitutes a more extensive provision to the same effect.] 1025.

A decree of foreclosure on a mortgage cannot be obtained until the estate has become forfeited at law by breach of the condition. A default in payment of a half-year's interest on the appointed day will be a sufficient breach of condition to enable the mortgagee to foreclose (e). 1026.

(a) 2 Spence's Eq. Jur. 729.

(b) *Inman v. Inman*, L. R. 15 Eq. 260.

(c) *The Queen v. The Shropshire*

*Union Ry., &c., Co.*, L. R. 8 Q. B. (Ex. Ch.) 420; 7 H. L. 496.

(d) Story's Eq. Jur. § 1026.

(e) Coote Mortg., 3rd ed. 497.

An immediate mortgagee is entitled to file a bill of foreclosure against the mortgagor and the subsequent mortgagees (*a*). A person entitled to a part only of the mortgage money cannot file a bill to foreclose a portion of the estate (*b*). A bill of foreclosure may be filed notwithstanding a decree for redemption ; for the mortgagor may make default (*c*). Where a decree of foreclosure is made against an infant heir or devisee of the mortgagor, the infant has a year and a day to show cause against the decree on his coming of age ; but he can only do this by showing error in the decree or falsifying the accounts for fraud or error (*d*). **1027.**

Pr. 11, T. 10,  
Ch. 2, s. 1.

A foreclosure suit cannot be brought but within [twelve] years after the right to bring such suit first accrued, or within [twelve] years after the last payment of any part of the principal money or interest (*e*). **1028.**

With respect to incumbrances subsequent to the mortgage but prior to the filing of the bill, the rule appears to be, that the decree of foreclosure will bind all those who are parties to it, but not the rest (*f*). **1029.**

Even after a decree of foreclosure has been signed and enrolled, and the mortgagee has been in possession for many years, nevertheless the Court will, under special circumstances, open the decree, but not merely on account of the overvalue of the estate (*g*). **1030.**

It has been usual to give the mortgagee an express power of sale. **1031.**

Though a power of sale be harshly exercised, and at a time when, having regard to the interests of the mortgagor,

(*a*) 2 Spence's Eq. Jur. 674 ;  
[and as to the amount of interest payable in an action by a first mortgagee against the mortgagor and subsequent mortgagees, see *Elton v. Curteis*, L. R. 19 Ch. D. 49].

(*b*) 2 Spence's Eq. Jur. 674.

(*c*) Id. 675.

(*d*) Id. 680, 681.

(*e*) See stat. 37 & 38 Vict. c. 57, ss. 8, 9, in Appendix.

(*f*) Coote Mortg., 3rd ed. 504.

(*g*) Coote Mortg., 3rd ed. 496.

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Ch. 2, s. 1.

he would not have been advised to sell, yet the sale cannot be impeached on that account (*a*). But where the power of sale is given to a trustee, it is his duty to attend equally to the interests of both parties (*b*). And a mortgagee ought not to exercise a power of sale for other purposes than the recovery of his money (*c*). And if he sells after tender of principal and interest (and the costs, unless they are unascertained and the security is ample), the sale will be set aside as against him and a purchaser with notice of the tender (*d*). **1032.**

Where notice to the mortgagor is required, a clause that a purchaser should not be required to ascertain that notice had been given, and that the mortgagee's receipt should be a sufficient discharge, does not apply to a case where the purchase is made with actual knowledge that such notice has not been given (*e*). **1033.**

A sale may be made without notice to the mortgagor, and without his concurrence, unless that is made a condition (*f*). And the concurrence of the mortgagor cannot be required by a purchaser, although there be an express covenant on his part to join in the sale (*g*). **1034.**

But where a mortgage is made to a solicitor, notice to the mortgagor should be required before a sale, or if that condition or qualification is omitted from the power, the solicitor should explain to the mortgagor that the power is not in the usual form; otherwise it will be a breach of duty which will render the solicitor liable in damages (*h*). **1034a.**

Where the surplus produce on the execution of a power of sale in a mortgage in fee is directed to be paid to

(*a*) 2 Spence's Eq. Jur. 634, 646. & Sm. 143.

(*b*) Id. 636.

(*f*) 2 Spence's Eq. Jur. 635; *Norman v. Nelfe*, 33 Beav. 522.

(*c*) *Robertson v. Norris*, 1 Gif. 421; affirmed on appeal.

(*g*) Coote Mortg., 3rd ed. 127.

(*d*) *Jenkins v. Jones*, 2 Gif. 99.

(*h*) *Chubburn v. Edwards*, L. R.

(*e*) *Parkinson v. Hanbury*, 1 Drew.

18 Ch. D. (Ap.) 449.



the mortgagor, his executors, etc., this is not of itself a conversion of the equity of redemption into personal estate. If the sale takes place in the lifetime of the mortgagor, the surplus is personal estate; but if he dies before the sale is made, the equity of redemption descends to the heir, and he is entitled to the surplus (a). **1035.**

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Ch. 2, s. 1.

A trustee for sale cannot become the purchaser (b). But a second mortgagee may buy under a power of sale from the first mortgagee; and in such case, he will obtain, as against the mortgagor, an irredeemable title to the property (c). **1036.**

A power of sale in a mortgage deed may be exercised by selling for a sum not paid down at the time, but allowed to remain on mortgage, and by conveying to a trustee in trust to sell and pay the money, if the purchaser should make default; the mortgagee who so exercises such power, of course, giving credit to the mortgagor for the whole mortgage money, as if paid down at the time (d). **1037.**

Where there are several incumbrancers, a decree for sale of an incumbered estate does not alter the relative rights of the parties: the purchase money is substituted for the estate (e). **1038.**

By the stat. 23 & 24 Vict. c. 145 (f), after reciting that "certain powers and provisions which it is now usual to insert in settlements, mortgages, wills, and other instruments should be made incident to the estates of the persons interested, so as to dispense with the necessity of inserting the same in terms in every such instrument"; it is enacted

Enactment  
of the stat.  
23 & 24 Vict.  
c. 145,

(a) 2 Spence's Eq. Jur. 636; Coote Mortg., 3rd ed. 130.

*Kirkwood v. Thompson*, 2 Hem. & Mil. 392; 2 D. J. & S. 613.

(b) 2 Spence's Eq. Jur. 636; *Turner, L.J.*, in *Parkinson v. Hanbury*, 2 D. J. & S. 450.

(d) *Thurlow v. Mackeson*, L. R. 4 Q. B. 97.

(c) *Parkinson v. Hanbury*, 1 Drew. & Sm. 143; *Shaw v. Bunny*, 33 Beav. 494; 2 D. J. & S. 468;

(e) 2 Spence's Eq. Jur. 678.

(f) But see ss. 31—4, *infra*, Part IV. T. 1, Ch. 2.

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Ch. 2, s. 1.

by s. 11, "that where any principal money is secured or charged by deed on any hereditaments of any tenure, or on any interest therein, the person to whom such money shall for the time being be payable, his executors, administrators, and assigns, shall, at any time, after the expiration of one year from the time when such principal money shall have become payable, according to the terms of the deed, or after any interest on such principal money shall have been in arrear for six months, or after any omission to pay any premium on any insurance which by the terms of the deed ought to be paid by the person entitled to the property subject to the charge, have the following powers, to the same extent (but no more) as if they had been in terms conferred by the person creating the charge; namely, 1st, A power to sell or concur with any other person in selling the whole or any part of the property by public auction or private contract, subject to any reasonable conditions he may think fit to make, and to rescind or vary contracts for sale, or buy in and re-sell the property, from time to time, in like manner; 2nd, A power to insure and keep insured from loss or damage by fire the whole or any part of the property (whether affixed to the freehold or not) which is in its nature insurable, and to add the premiums paid for any such insurance to the principal money secured at the same rate of interest; 3rd, A power to appoint or obtain the appointment of a receiver of the rents and profits of the whole or any part of the property in manner herein-after mentioned." 1039.

giving a  
power of  
sale,

power to  
insure,

power to  
appoint  
receiver.

Stat. 44 & 45  
Vict. c. 41.  
The Con-  
veyancing  
and Law of  
Property  
Act, 1881.

Powers in-  
cident to  
estate or  
interest of  
mortgagee.

[The provisions contained in ss. 11—30 of this Act have now been repealed by stat. 44 & 45 Vict. c. 41 (Appendix), which enacts with respect to mortgages made after the 31st day of December, 1881, by s. 19, that "(1) A mortgagee, where the mortgage is made by deed, shall, by virtue of this Act, have the following powers, to the like extent as if they had been in terms conferred by the

[mortgage deed, but not further (namely) : (i.) A power, when the mortgage money has become due, to sell, or to concur with any other person in selling, the mortgaged property, or any part thereof, either subject to prior charges, or not, and either together or in lots, by public auction or by private contract, subject to such conditions respecting title, or evidence of title, or other matter, as he (the mortgagee) thinks fit, with power to vary any contract for sale, and to buy in at an auction, or to rescind any contract for sale, and to re-sell, without being answerable for any loss occasioned thereby ; and (ii.) A power, at any time after the date of the mortgage deed, to insure and keep insured against loss or damage by fire any building, or any effects or property of an insurable nature, whether affixed to the freehold or not, being or forming part of the mortgaged property, and the premiums paid for any such insurance shall be a charge on the mortgaged property, in addition to the mortgage money, and with the same priority, and with interest at the same rate, as the mortgage money ; and (iii.) A power, when the mortgage money has become due, to appoint a receiver of the income of the mortgaged property, or of any part thereof ; and (iv.) A power, while the mortgagee is in possession, to cut and sell timber and other trees ripe for cutting, and not planted or left standing for shelter or ornament, or to contract for any such cutting and sale, to be completed within any time not exceeding twelve months from the making of the contract. (2) The provisions of this Act relating to the foregoing powers, comprised either in this section, or in any subsequent section regulating the exercise of those powers, may be varied or extended by the mortgage deed, and, as so varied or extended, shall, as far as may be, operate in the like manner and with all the like incidents, effects, and consequences, as if such variations or extensions were contained in this Act. (3) This section

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[applies only if and as far as a contrary intention is not expressed in the mortgage deed, and shall have effect subject to the terms of the mortgage deed and to the provisions therein contained." 1040.

Regulation  
of exercise  
of power  
of sale.

Also by s. 20 "A mortgagee shall not exercise the power of sale conferred by this Act unless and until (i.) Notice requiring payment of the mortgage money has been served on the mortgagor or one of several mortgagors, and default has been made in payment of the mortgage money, or of part thereof, for three months after such service; or (ii.) Some interest under the mortgage is in arrear and unpaid for two months after becoming due; or (iii.) There has been a breach of some provision contained in the mortgage deed or in this Act, and on the part of the mortgagor, or of some person concurring in making the mortgage, to be observed or performed, other than and besides a covenant for payment of the mortgage money or interest thereon." 1041.

Conveyance,  
receipt, and  
application  
of purchase  
money.

And by s. 21, "(1) A mortgagee exercising the power of sale conferred by this Act shall have power, by deed, to convey the property sold, for such estate and interest therein as is the subject of the mortgage, freed from all estates, interests, and rights to which the mortgage has priority, but subject to all estates, interests, and rights which have priority to the mortgage; except that, in the case of copyhold or customary land, the legal right to admittance shall not pass by a deed under this section, unless the deed is sufficient otherwise by law, or is sufficient by custom, in that behalf. (2) Where a conveyance is made in professed exercise of the power of sale conferred by this Act, the title of the purchaser shall not be impeachable on the ground that no case had arisen to authorize the sale, or that due notice was not given, or that the power was otherwise improperly or irregularly exercised; but any person damnified by an unauthorized, or improper, or

[Irregular exercise of the power shall have his remedy in damages against the person exercising the power. (3) The money which is received by the mortgagee, arising from the sale, after discharge of prior incumbrances to which the sale is not made subject, if any, or after payment into Court under this Act of a sum to meet any prior incumbrance, shall be held by him in trust to be applied by him, first, in payment of all costs, charges, and expenses, properly incurred by him, as incident to the sale or any attempted sale, or otherwise; and secondly, in discharge of the mortgage money, interest, and costs, and other money, if any, due under the mortgage; and the residue of the money so received shall be paid to the person entitled to the mortgaged property, or authorized to give receipts for the proceeds of the sale thereof. (4) The power of sale conferred by this Act may be exercised by any person for the time being entitled to receive and give a discharge for the mortgage money. (5) The power of sale conferred by this Act shall not affect the right of foreclosure. (6) The mortgagee, his executors, administrators, or assigns, shall not be answerable for any involuntary loss happening in or about the exercise or execution of the power of sale conferred by this Act or of any trust connected therewith. (7) At any time after the power of sale conferred by this Act has become exerciseable, the person entitled to exercise the same may demand and recover from any person, other than a person having in the mortgaged property an estate, interest, or right in priority to the mortgage, all the deeds and documents relating to the property, or to the title thereto, which a purchaser under the power of sale would be entitled to demand and recover from him." 1042.

And by s. 22, "(1) The receipt in writing of a mortgagee shall be a sufficient discharge for any money arising under the power of sale conferred by this Act, or for any money or securities comprised in his mortgage, or arising there-

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Ch. 2, s. 1.

Mortgagee's  
receipts, dis-  
charges, etc.

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[under ; and a person paying or transferring the same to the mortgagee shall not be concerned to inquire whether any money remains due under the mortgage. (2) Money received by a mortgagee under his mortgage or from the proceeds of securities comprised in his mortgage shall be applied in like manner as in this Act directed respecting money received by him arising from a sale under the power of sale conferred by this Act ; but with this variation, that the costs, charges, and expenses payable shall include the costs, charges, and expenses properly incurred of recovering and receiving the money or securities, and of conversion of securities into money, instead of those incident to sale.”  
1043.

Amount and  
application  
of insurance  
money.

And by s. 23, “ (1) The amount of an insurance effected by a mortgagee against loss or damage by fire under the power in that behalf conferred by this Act shall not exceed the amount specified in the mortgage deed, or, if no amount is therein specified, then shall not exceed two third parts of the amount that would be required, in case of total destruction, to restore the property insured. (2) An insurance shall not, under the power conferred by this Act, be effected by a mortgagee in any of the following cases, namely : (i.) Where there is a declaration in the mortgage deed that no insurance is required ; (ii.) Where an insurance is kept up by or on behalf of the mortgagor in accordance with the mortgage deed ; (iii.) Where the mortgage deed contains no stipulation respecting insurance, and an insurance is kept up by or on behalf of the mortgagor, to the amount in which the mortgagee is by this Act authorized to insure. (3) All money received on an insurance effected under the mortgage deed or under this Act shall, if the mortgagee so requires, be applied by the mortgagor in making good the loss or damage in respect of which the money is received. (4) Without prejudice to any obligation to the contrary imposed by law,

[or by special contract, a mortgagee may require that all money received on an insurance be applied in or towards discharge of the money due under his mortgage." 1044.

Pr. II. T. 10,  
Ch. 2, s. 1.

By s. 24, "(1) A mortgagee entitled to appoint a receiver under the power in that behalf conferred by this Act shall not appoint a receiver until he has become entitled to exercise the power of sale conferred by this Act, but may then, by writing under his hand, appoint such person as he thinks fit to be receiver." 1045.

Appointment of receiver.

Also "(2) The receiver shall be deemed to be the agent of the mortgagor; and the mortgagor shall be solely responsible for the receiver's acts or defaults, unless the mortgage deed otherwise provides." 1046.

Receiver deemed to be the agent of the mortgagor.

And "(3) The receiver shall have power to demand and recover all the income of the property of which he is appointed receiver, by action, distress, or otherwise, in the name either of the mortgagor or of the mortgagee, to the full extent of the estate or interest which the mortgagor could dispose of, and to give effectual receipts, accordingly, for the same." And "(4) A person paying money to the receiver shall not be concerned to inquire whether any case has happened to authorize the receiver to act." 1047.

Powers of receiver.

And "(5) The receiver may be removed, and a new receiver may be appointed from time to time by the mortgagee by writing under his hand." 1048.

Removal of receivers and appointment of others.

And "(6) The receiver shall be entitled to retain out of any money received by him, for his remuneration, and in satisfaction of all costs, charges, and expenses incurred by him as receiver, a commission at such rate, not exceeding five per centum on the gross amount of all money received, as is specified in his appointment, and if no rate is so specified, then at the rate of five per centum on that gross amount, or at such higher rate as the Court thinks fit to allow, on application made by him for that purpose." 1049.

Receiver to receive a commission not exceeding five per cent.

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Receiver to  
insure if  
required.

[And “(7) The receiver shall, if so directed in writing by the mortgagee, insure and keep insured against loss or damage by fire, out of the money received by him, any building, effects, or property comprised in the mortgage, whether affixed to the freehold or not, being of an insurable nature.” 1050.

Application  
of moneys  
received by  
him.

And “(8) The receiver shall apply all money received by him as follows, namely: (i.) In discharge of all rents, taxes, rates, and outgoings whatever affecting the mortgaged property; and (ii.) In keeping down all annual sums or other payments, and the interest on all principal sums, having priority to the mortgage in right whereof he is receiver; and (iii.) In payment of his commission, and of the premiums on fire, life, or other insurances, if any, properly payable under the mortgage deed or under this Act, and the cost of executing necessary or proper repairs directed in writing by the mortgagee; and (iv.) In payment of the interest accruing due in respect of any principal money due under the mortgage; and shall pay the residue of the money received by him to the person who, but for the possession of the receiver would have been entitled to receive the income of the mortgaged property, or who is otherwise entitled to that property.” 1051.

The above powers and provisions of stat. 44 & 45 Vict. c. 41 (Appendix) are similar to those contained in the repealed sections of stat. 23 & 24 Vict. c. 145.] 1052.

Concurrent  
remedies of  
mortgagee.

The Court will not prevent a mortgagee from using all the remedies belonging to his character of mortgagee, and exercising all the powers that are given to him, as and when he pleases, even concurrently (a). A power of sale is only an additional remedy, and therefore does not interfere with the right of the mortgagee to foreclosure (b). If a debt is secured by a mortgage of real estate, and also by

(a) 2 Spence's Eq. Jur. 634, 646.

(b) 2 Spence's Eq. Jur. 636.



covenant, and collaterally by bond, the mortgagee may pursue all his remedies at the same time. If he obtains full payment on the bond or covenant, the mortgagor is, by the fact of payment, entitled to the estate, and foreclosure is prevented or not allowed. But if the mortgagee obtains only part payment on the bond or covenant, he may go on with his foreclosure suit, and, giving credit in account for what he has recovered on the bond or covenant, he may foreclose for non-payment of the remainder. On the other hand, if he obtains a foreclosure first, and alleges that the value of the estate is not sufficient to satisfy the debt, he is not absolutely precluded from suing on the bond or covenant; but it is held that by doing so, he gives to the mortgagor a renewed right to redeem, or, in other words, opens the foreclosure; and consequently, upon the commencement of an action against the mortgagor, on the bond after foreclosure, he may file a bill for redemption, and upon payment of the whole debt secured by the mortgage, he is entitled to have the estate back again, and the securities given up. After foreclosure, therefore, the Court will not restrain the mortgagee from suing on the bond, provided he retains the mortgaged estate in his own power, ready to be redeemed, in case the mortgagor should think fit to avail himself of the opening of the foreclosure (a). 1053.

If a mortgagee sells under a power of sale, and the sale does not realize enough to pay off the mortgage debt and interest, he may sue the mortgagor on his covenant for the balance (b). 1054.

But if a mortgagee (except under a power of sale) so deals with the mortgaged estate, as to render it impossible for him to restore it on full payment, the Court will prevent his suing at law to recover the mortgage money, as where the mortgagee joins in an alienation of the estate without

(a) 2 Spence's Eq. Jur. 682.

(b) *Rudge v. Richens*. L. R. 8 C. P. 358.

Pr. II. T. 10, being authorized by the mortgagor, and receives no part  
Ch. 2, s. 1. of the purchase money (a). 1055.

III. Mort-  
gagor's  
estate and  
rights.

III. We have already seen that as long as the mortgagor continues in possession, he has a right of redemption, even at law, under the stat. 15 & 16 Vict. c. 76, ss. 219, 220, if an action of ejectment is brought against him, and no suit for redemption or foreclosure is pending in a Court of Equity. [Also by stat. 36 & 37 Vict. c. 66, s. 25 (5), "A mortgagor entitled for the time being to the possession or receipt of the rents and profits of any land as to which no notice of his intention to take possession, or to enter into the receipt of the rents and profits thereof, shall have been given by the mortgagee, may sue for such possession, or for the recovery of such rents and profits, or to prevent or recover damages in respect of any trespass or other wrong relative thereto, in his own name only, unless the cause of action arises upon a lease, or other contract made by him jointly with any other person."] And until foreclosure, the mortgagor, whether in possession or not, is considered in equity as substantially the owner of the estate, though his ownership is subject to restrictions for the protection of the mortgagee. Hence, if the mortgagor applies to be allowed to redeem before the right of redemption is lost by a lapse of twelve years, during which no acknowledgment has been made by the mortgagee of the mortgagor's title or of his right of redemption, the mortgagee will then be treated as a trustee for the mortgagor, inasmuch as he will be compelled to reconvey the estate, and account for every kind of profit that he has made in the ordinary way, or which, but for his wilful default, he might have made (b). This is termed an equity of redemption. 1056.

Equity of  
redemption.

(a) *Palmer v. Hendrie*, 27 Beav. 349; *Rudge v. Richens*, L. R. 8 C. P. 358.

(b) See Story's Eq. Jur. § 1016,

1013, 1028 a; and 37 & 38 Vict. c. 57, s. 7, in Appendix; 2 Spence's Eq. Jur. 644, 645, 648, 710, 806; Coote Mortg., 3rd ed. 345.

An equity of redemption is so inseparable an incident to a mortgage, that it cannot be disannexed from such a transaction, or controlled even by an express agreement (a). 1057.

Pr. II. T. 10,  
Ch. 2, s. 1.

It may be considered as an almost universal rule, that, in order to protect the debtor against oppression by the creditor, wherever a conveyance or assignment of an estate is originally intended as a security for money, whether this intention appears on the deed itself or by any other instrument, or even by parol evidence, and whether directly or indirectly, it will ever after be considered in equity as a mortgage, and therefore redeemable on the usual terms, though at the time of the loan, or as part of the same transaction, there may have been an express agreement between the parties that it should not be redeemable, or that the right of redemption shall be confined to a particular time or to a particular person or description of persons; for such an agreement will be void (b). And upon the same principle, equity will not allow the mortgagee to enter into a contract with the mortgagor, at the time of the loan, for the absolute purchase of the lands for a specific sum, in case of default made in payment of the mortgage money at the appointed time (c). And if a mortgagor in embarrassed circumstances conveys his equity of redemption to the mortgagee (under pressure for payment of the mortgage debt) for a sum considerably less than its value, the sale will be set aside (d). 1058.

The equity of redemption constitutes an equitable estate in the land, which is descendible in the same manner as the land itself is by the general law or the particular custom, and may be granted, devised, and entailed; and if

(a) Story's Eq. Jur. § 1019; 2 Spence's Eq. Jur. 618—623; Coote Spence's Eq. Jur. 618, 619, 628: Mortg., 3rd ed. 11, 12, 14.  
Coote Mortg., 3rd ed. 11, 12, 14.

(c) Coote Mortg., 3rd ed. 14.

(b) Story's Eq. Jur. § 1018; 2

(d) *Ford v. Olden*, L. R. 3 Eq. 461.

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CH. 2, s. 1.

entailed, might have been barred by a fine or recovery, and may now be barred by a disentailing deed, and is liable to a tenancy by the curtesy, and since the statute 3 & 4 Will. 4, c. 105, s. 2, to dower (a). 1059.

The owner of the equity of redemption of part of the estate in mortgage cannot separately redeem his part: the mortgagee has a right to insist that the whole of the mortgaged estate shall be redeemed together (b). And where a mortgagee lends two distinct sums to the same mortgagor, on two securities, although they be only equitable securities, and although created by two distinct instruments, and at different times, and though the property in one be real and in the other personal, the mortgagor, or any one claiming under him (even a purchaser of the equity of redemption or mortgagee of the estate sought to be redeemed, who had no notice of the mortgage on the estate not sought to be redeemed), cannot redeem the property comprised in one security, without redeeming the property comprised in the other also; for the person who has the two mortgages has a right to consolidate them so as to insist on both being paid off together (c); at least this is the case where the security not desired to be redeemed is defective in title, or deficient in value. And where two mortgages of distinct estates, originally vested in different mortgagees, are transferred to one person, even with notice of a second mortgage, the second mortgagee cannot redeem one estate without the

(a) Story's Eq. Jur. § 1015; 2 Spence's Eq. Jur. 642, 645; Cooté Mortg., 3rd ed. 26.

(b) 2 Spence's Eq. Jur. 666.

(c) Story's Eq. Jur. § 1023, note; 2 Spence's Eq. Jur. 651, 666, 726; Cooté Mortg., 3rd ed. 400, 597; Sugd. Concise View, 136; V. & P., 13th ed. 164; 5 Jarm. & Byth., 3rd ed. 436; Fisher on Mortg. 381—390; Jones v. Smith, 2 Ves. 376—7; Shuttleworth v. Laycock, 1 Vern.

244—5; Margrave v. Le Hooke, 2 Vern. 206; Willie v. Lugg 2, Eden 79; Pope v. Onslow, 2 Vern. 285; Titley v. Davies, 2 Y. & Col. N. R. 399, n.; Ex parte Carter, Amb. 733; Ireson v. Denn, 2 Cox 425; Furebrother v. Woodham, 23 Beav. 18; Watts v. Symes, 1 D. M. & G. 240; Neve v. Pennell, 2 Hem. & Mil. 170; Beevor v. Luck, L. R. 4 Eq. 537.

other (a). And where the mortgagee has sold one estate under a power, he may apply the balance of the proceeds of that estate, after payment of the mortgage debt upon it, towards payment of the debt upon the other (b). The principle appears to be that the debtor, whether in a redemption suit or in a foreclosure suit, and those claiming under him, cannot redeem without doing what is equitable on his part, by paying all that he has covenanted to pay, and secured by mortgage (c). 1060.

[The general rule of law which formerly prevailed, that a mortgagee of two different estates belonging to the same mortgagor, might consolidate them, so that the mortgagor could not redeem one without the other, has been the subject of many important recent decisions. It has been held (over-ruling the decision in the case of *Tassel v. Smith*, 2 De G. & J. 713), that a purchaser of an equity of redemption of an estate, takes subject to equities arising from acts done by his vendor previously, but not subsequently to the sale, and therefore, as against such a purchaser, there can be no consolidation of a mortgage subsequently created on another estate (d). Also that consolidation only applies when default has been made on all the securities in respect of which it is claimed (e). And that there can be no consolidation of two mortgage debts, on two several estates, where one of the estates mortgaged has ceased to exist, as in case of a forfeited leasehold (f). 1060a.

But that rule of law is now modified by stat. 44 & 45 Vict. c. 41 (Appendix), which enacts by s. 17, that "(1) A mortgagor seeking to redeem any one mortgage, shall, by

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Ch. 9, s. 1.

Consolidation.

Stat. 44 & 45  
Vict. c. 41,  
s. 17.  
The Con-  
veyancing  
and Law of

(a) *Vint v. Padget*, 1 Gif. 446; 2 D. & J. 611; *Beevor v. Luck*, L. R. 4 Eq. 537.

(b) *Selby v. Pomfret*, 1 Johns. & Hem. 336; 3 D. F. & J. 595.

(c) *Wicks v. Scrivens*, 1 Johns. & Hem. 215.

(d) *Mills v. Jennings*, L. R. 13 Ch. D. (Ap.) 639.

(e) *Cummins v. Fletcher*, L. R. 14 Ch. D. (Ap.) 699.

(f) *In re Raggett, Ex parte Williams*, L. R. 16 Ch. D. (Ap.) 117.

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Ch. 2, s. 1.

Property  
Act, 1881.  
Restriction  
on com-  
solidation.

[virtue of this Act, be entitled to do so, without paying any money due under any separate mortgage made by him, or by any person through whom he claims, on property other than that comprised in the mortgage which he seeks to redeem. (2) This section applies only if and as far as a contrary intention is not expressed in the mortgage deeds or one of them. (3) This section applies only where the mortgages or one of them are or is made after the commencement of this Act," — that is, after the 31st of December, 1881.] 1060b.

Who may  
redeem.

Even a tenant for life, a tenant by the curtesy, a jointress, a tenant in dower in some cases, a reversioner, a remainderman, a judgment creditor, a tenant by elegit or by statute merchant, the lord of a manor holding by escheat (as regards a mortgage for a term of years, created by a mortgagor who has died without heirs, though not as regards a mortgage in fee, under which the whole estate has passed to the mortgagee, so that there can be no escheat), and indeed every other person having a legal or equitable interest in or lien on the land, may insist on redeeming the mortgage, in order duly to enforce his claim : and when any such person does so redeem, he or she obtains by substitution the rights and interests of the original mortgagee. But, as a general rule, a cestui que trust must redeem through his trustee ; and no creditor, or annuitant, or legatee of the mortgagor, who has not a specific security upon the property mortgaged, can bring an action for redemption, though the mortgaged property would, if redeemed, be applied in a course of administration in discharge of his claims (a). [And by stat. 44 & 45 Vict. c. 41, s. 25 (Appendix), any person entitled to redeem may obtain an order for sale. (b).] 1061.

(a) Story's Eq. Jur. § 1023 ; 2 Spence's Eq. Jur. 660—663 ; Coote Mortg., 3rd ed. 515—518 ; *Mildred v. Austin*, L. R. 8 Eq. 220 ; *Dawson*

*v. Bank of Whitehaven*, L. R. 6 Ch. D. (Ap.) 218.

(b) See also *South-Western Bank v. Turner*, 31 W. R. 113.

As regards the mere right to redeem, there is no substantial difference between a mortgage by way of trust for sale and a mortgage in the ordinary form (a). 1062.

Pr. II. T. 10,  
Ch. 2, s. 1.

Every person who has a right to redeem the mortgage, may redeem any prior incumbrance, on payment of principal, interest, and costs due to him ; the redeeming party being also liable to be redeemed by those below him, who are all liable to be redeemed by the mortgagor (b). 1063.

A mortgagor may, as we have seen, by a subsequent deliberate act, extinguish his equity of redemption. A mortgagee may purchase the equity of redemption of the mortgagor ; but the Court views such a transaction with jealousy (c). 1064.

Extinguishment or loss  
of equity of  
redemption.

By the stat. 4 & 5 Will. & M. c. 16, if a mortgagor shall not acquaint a mortgagee with the existence of a prior judgment, statute, or recognisance, affecting the property, and shall not pay off such judgment, statute, or recognisance, or shall not acquaint a mortgagee with the existence of a prior mortgage of the same property, he shall lose his equity of redemption (d). 1065.

As we have seen, the equity of redemption may also be lost by the operation of the Statute of Limitations. 1066.

In settling the accounts between the mortgagor and mortgagee, where the latter had been in possession and receipt of the rents, it often becomes a question of importance, whether the account shall be taken simply by ascertaining the aggregate amount of principal, interest, and costs due to the mortgagee at the period of redemption, on the one hand, and the aggregate amount of rents received by him, on the other ; or whether rests shall from time to time be made, so that the excess of the rent or value beyond the interest may be applied in sinking the

Annual  
rests.

(a) *Wicks v. Scrivens*, 1 Johns. & Hem. 215 ; *Kirkwood v. Thompson*, 2 Hem. & Mil. 392.

(b) 2 Spence's Eq. Jur. 665.

(c) 2 Spence's Eq. Jur. 654.

(d) See *Coots Mortg.*, 3rd ed. 211.

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Ch. 2, s. 1. principal. The rule on this point is, that the Court will adopt one or the other mode of taking the account, as the justice of the case requires. But annual rests are never made, except when the effect upon the whole would be beneficial to the mortgagor ; for, to make rests in other cases would give the mortgagee more than the interest upon his principal sum. And Courts of Equity will not require annual rests to be made, where the interest of the mortgage is in arrear at the time when the mortgagee takes possession, even though the rents and profits may exceed the annual interest (*a*). Annual rests will equally be directed in respect of the occupation rent fixed on a mortgagee in possession, as in respect of rents received (*b*).  
1067.

**Possession.** The mortgagor is not entitled to the possession in respect of his equitable estate, unless there is some special agreement to that effect, but he holds it solely at the will of the mortgagee, who may generally at any time, without giving any prior notice, recover the same by ejectment against him, unless he is ready to pay principal, interest, and costs (*c*), or [under the old law] against his tenants under a tenancy created subsequently to the mortgage, and not confirmed by the mortgagee ; and he is not even entitled to reap the crop. But so long as he continues in possession by the permission of the mortgagee, he is entitled to take the rents and profits in his own right, without rendering any account whatever to the mortgagee, though the mortgaged property may have become an insufficient security. But he will not be permitted to do anything which may diminish the security of the mortgagee. Yet he may cut down timber, when in

**Rents.**

**Waste.**

(*a*) Story's Eq. Jur. § 1016 a ; 2 Spence's Eq. Jur. 809 ; 5 Jarm. & Byth. by Sweet, 400 ; *Scholefield v. Lockwood* (No. 3), 32 Beav. 439 ;

*Thompson v. Hudson*, L. R. 10 Eq. 497.

(*b*) 2 Spence's Eq. Jur. 811.

(*c*) See *supra*, par. 997.



possession, unless the land alone would be a scanty security (a). **1068.** Pr. II. T. 10,  
Ch. 2, s. 1.

[And now by virtue of stat. 44 & 45 Vict. c. 41, s. 18 (Appendix), a mortgagor in possession has, as against every incumbrancer, and a mortgagee in possession has, as against all prior incumbrancers, and as against the mortgagor, power to make from time to time of the mortgaged land, (i.) an agricultural or occupation lease for any term not exceeding twenty-one years; and (ii.) a building lease for any term not exceeding ninety-nine years, and for the purpose of making such leases, to execute and do all necessary and proper assurances and things. But every such lease must be made to take effect in possession not later than twelve months after its date, and reserve the best rent that can reasonably be obtained, without any fine, and must contain a covenant for payment of rent, and a condition of re-entry on non-payment within a time not exceeding thirty days. And a counterpart must be executed by the lessee, and delivered to the lessor. And every such building lease must be made in consideration of buildings, repairs, or improvements already erected or executed, or agreed to be erected or executed within five years from the date of the lease, and a peppercorn or nominal rent may be made payable for the first five years, or any less part of the term. In case of a lease by the mortgagor, he must, within one month after making the lease, deliver to the mortgagee, or to the mortgagee first in priority, a counterpart duly executed by the lessee. And a contract to make or accept a lease under this section is enforceable by or against every person on whom the lease, if granted, would be binding. This section applies only if and as far as a contrary intention is not expressed by the mortgagor

Leasing  
powers of  
mortgagor  
and mort-  
gagee in  
possession.

(a) Story's Eq. Jur. § 1017; 2 Mortg., 3rd ed. 325, 332, 334; 3 Spence's Eq. Jur. 616. 648; Coote Jarm. & Byth. by Sweet, 44.

Pr. II. T. 10.  
Ch. 2, s. 1.

and mortgagee in the mortgage deed, or otherwise in writing, and has effect subject to the terms of the mortgage deed or of any such writing. And it enacts, "(14) Nothing in this Act shall prevent the mortgage deed from reserving to or conferring on the mortgagor, or the mortgagee, or both, any further or other powers of leasing or having reference to leasing; and any further or other powers so reserved or conferred shall be exercisable, as far as may be, as if they were conferred by this Act, and with all the like incidents, effects, and consequences, unless a contrary intention is expressed in the mortgage deed. (15) Nothing in this Act shall be construed to enable a mortgagor or mortgagee to make a lease for any longer term or on any other conditions than such as could have been granted or imposed by the mortgagor, with the concurrence of all the incumbrancers, if this Act had not been passed. (16) This section applies only in case of a mortgage made after the commencement of this Act; but the provisions thereof, or any of them, may, by agreement in writing made after the commencement of this Act between mortgagor and mortgagee, be applied to a mortgage made before the commencement of this Act, so nevertheless, that any such agreement shall not prejudicially affect any right or interest of any mortgagee not joining in or adopting the agreement. (17) The provisions of this section referring to a lease shall be construed to extend and apply, as far as circumstances admit, to any letting, and to an agreement, whether in writing or not, for leasing or letting" (a).]

**1068a.**

Expendi-  
ture.

A mortgagee in possession is not obliged to lay out money any further than to keep the property in necessary repair, and then only to the amount of the surplus rents; and he has no right to make it more expensive for the

(a) *In re Nugent & Riley's Contract*, 27 Sol. Journ. 636.

mortgagor to redeem than may be required for the purpose of keeping the property in a proper state of repair, and of protecting the title to the property. Hence, he will not be allowed for general improvements made without the consent or acquiescence of the mortgagor (a). **1069.**

Fr. II. T. 10.  
Ch. 2, s. 1.

IV. Mortgages of copyholds usually consist of a conditional surrender in the Manor Court by the mortgagor to the mortgagee and his heirs. By the condition the surrender is made void on payment, by the mortgagor, etc., of principal and interest, to the mortgagee, etc., on a given day. The condition is entered on the rolls, and immediately follows the surrender. The condition may, however, be contained in a separate deed of defeasance of even date with the surrender. But this mode should never be resorted to when it can be avoided, as the defeasance may be lost (b). **1070.**

IV. Mortgage of copyholds.  
How made.

In addition to the surrender and condition, there is usually a previous covenant to surrender, containing covenants for the title and for payment of the money (c). **1071.**

If the money is paid at the stipulated time, and the surrender has not been perfected by admittance, it becomes void without further ceremony, and the surrenderor is in possession, without any readmission or fine; or if the mortgagee has been admitted, and has taken possession, the mortgagor may yet resume his estate by making an entry on the land (d). But as upon admittance a fine becomes due to the lord, it is not usual for a mere mortgagee to be admitted to the copyhold until some suspicion arises that his loan will not otherwise be repaid (e). **1072.**

How vacated.

Mortgagee frequently not admitted.

(a) Story's Eq. Jur. § 1016 b; 2 Spence's Eq. Jur. 808; Coote Mortg., 3rd ed. 344.

(b) Coote Mortg., 3rd ed. 112.

(c) Coote Mortg., 3rd ed. 116.

(d) Burton, § 1265; Coote Mortg., 3rd ed. 113.

(e) Burton, § 1266.

Pr. II. T. 10,  
Ch. 2, s. 1.

What acts  
surrenderer  
can do  
before  
admittance.

A mortgagee not being a tenant until admittance, cannot in the meantime pass the lands by surrender. He may, however, make an equitable transfer of them. And he may also devise the lands ; and in the case of a will made before 1st of January, 1838, they would pass in equity, but the devisee was not entitled to admission as legal tenant ; for a legal devise of copyholds could not be made before admittance ; and therefore, although the devisee may have been admitted, the surrenderor or his heir still remained tenant to the lord (a). 1073.

Foreclosure  
before  
admittance.

After breach of the condition, a mortgagee of a copyhold may proceed to foreclose the estate, even before admittance (b). 1074.

Surrender  
to use of  
will.

Since the passing of the 55 Geo. 3, c. 192, surrenders of copyholds to the use of a will are no longer necessary. But, prior to that statute, a surrender made by the mortgagee to the use of his will before admittance was void, and would not have been made good by a subsequent admittance (c). 1075.

Conse-  
quences of  
the admit-  
tance of the  
mortgagee.

If the surrenderee is admitted, and the condition is broken by the non-payment of the money, his estate is absolute, and when the mortgage is paid off, a readmission and fine will be necessary, and the mortgagor will thereupon gain a new estate ; and the descent will be altered, so that if the lands had originally descended to him *ex parte maternâ*, they will afterwards descend as if he had taken by purchase (d). 1076.

After the conditional surrenderee has been admitted, he becomes the tenant of the lord, and the surrenderor may release to him the equity of redemption, before condition broken (e). 1077.

Second  
surrender.

In the interval before the admittance of the mortgagee,

(a) Coote Mortg., 3rd ed. 114.

(d) Coote Mortg., 3rd ed. 113.

(b) Coote Mortg., 3rd ed. 500.

(e) Coote Mortg., 3rd ed. 114.

(c) Coote Mortg., 3rd ed. 116.

the mortgagor may make a second surrender, which will be good, if the first surrender is not perfected by admittance. But although the first surrender be not enrolled, the second mortgagee, though without notice of the former, does not, by the enrolment of his surrender, acquire priority (*a*). 1078.

Pr. II. T. 10,  
Ch. 2, s. 1.

The equity of redemption may be of course mortgaged without surrender, and will pass by deed, being an equitable interest only (*b*). 1079.

Mortgage of  
the equity  
of redemption  
of  
copyholds.

If freeholds are conveyed in mortgage, with a covenant, for better securing the payment of the debt, to procure admission to certain copyholds, and surrender them to the mortgagee, and in the meantime to stand seised of the copyhold estate in trust for him, both freeholds and copyholds are primarily mortgaged, and both equally liable to the mortgage debt (*c*). 1080.

Mortgage of  
freeholds  
and copy-  
holds to-  
gether.

V. Where a mortgage is by assignment of a leasehold interest, unless there is a special provision to the contrary, the mortgagee, as between himself and the mortgagor, takes subject to the covenants and obligations of the original lease. But if an underlease, instead of an assignment, is taken, the mortgagee is protected (*d*). 1081.

V. Mort-  
gage of  
leasehold.

A mortgage, whether legal or equitable, of leasehold premises, includes the goodwill of a trade followed on the premises, and the fixtures (*e*). A goodwill of a business is that connection in trade which induces customers to deal with the person or persons carrying on that business. It varies in almost every case; but it is in effect an appreciable part of the assets of a concern, which may be preserved (at least to some extent) if the business is sold as a going concern, but is wholly lost if the concern is wound up, its liabilities discharged, and its assets got in and dis-

Goodwill.

(*a*) Coote Mortg., 3rd ed. 115.

(*d*) 2 Spence's Eq. Jur. 614.

(*b*) Coote Mortg., 3rd ed. 114.

(*e*) 2 Spence's Eq. Jur. 637; Coote

(*c*) Coote Mortg., 3rd ed. 491.

Mortg., 3rd ed. 123.

Pr. II. T. 10,  
Ch. 2, s. 1.

tributed. It does not survive to the remaining partners, on the decease of one of the partners, unless by express agreement, but belongs to the surviving partners and the estate of the deceased partner, according to the terms of the contract, and when that is silent, according to their shares in the concern (a). 1082.

Mortgage of  
renewable  
leasehold.

Neither the mortgagor nor the mortgagee of a renewable leasehold is bound to renew, if it is not a part of his contract to do so ; except that where a tenant for life of renewable leaseholds mortgages his life estate, the liability to renew will follow the mortgagee, in respect of the rents received by him (b). If a renewable leasehold is assigned by way of mortgage, an agreement between the landlord and the mortgagee, without the concurrence of the mortgagor, will not bind the mortgagor (c). 1083.

VI. Rent  
instead of  
interest.

VI. Where the relation of mortgagor and mortgagee subsists, it is hardly possible that an agreement, under which the mortgagee is to hold the land at a rent as an equivalent for interest can be supported ; it being considered, independently of the question as to usury (d), to be against public policy, that such agreements should be permitted to take place between parties one of whom has an obvious advantage over the other (e). 1084.

VII. Mort-  
gage for  
costs.

VII. A solicitor may take a mortgage security from his client for costs already due, but, prior to the stats. 33 & 34 Vict. c. 28, s. 16, and 44 & 45 Vict. c. 44, ss. 5, 8, not for costs to become due (f). 1085.

VIII. Con-  
veyance in  
trust to sell.

VIII. Lands are sometimes conveyed by way of security to a third person agreed upon by the borrower and lender, or to the lender himself, in trust, upon non-payment of the

(a) *Wedderburn v. Wedderburn*, 22 Beav. 104 ; *Smith v. Everett*, 27 Beav. 446. As to the goodwill of a business, and of a solicitor's business in particular, see *Austin v. Boys*, 2 D. & J. 635—8.

(b) *Coote Mortg.*, 3rd ed. 122, 344,

349 ; 2 *Spence's Eq. Jur.* 650.

(c) 2 *Spence's Eq. Jur.* 650.

(d) As to usury, see *infra*, Part III. Tit. 12, Ch. 6, s. 4.

(e) See 2 *Spence's Eq. Jur.* 617.

(f) 2 *Spence's Eq. Jur.* 630 ; *Coote Mortg.*, 3rd ed. 369.

loan at the appointed time, and usually upon notice, to sell the estate, and satisfy the debt out of the proceeds. This is a species of mortgage. It is not such a trust for sale as the mortgagor can enforce ; because the discretion as to selling or not is in the mortgagee alone. On the other hand, the mortgagee cannot file a bill of foreclosure, but is limited to his remedy by sale. And in this case, though the mortgagor covenant to join, the purchaser cannot require that he should join in the conveyance (a). 1086.

Pr. II. T. 10,  
Ch. 2, s. 1.

IX. In the case of a mortgage by a tenant in tail, the mortgagee obtains a term determinable by entry of the issue, if the mortgage is by demise ; and a base fee determinable in like manner, if the mortgage is in fee, whether there is a covenant for further assurance or not. If, prior to the stat. 3 & 4 Will. 4, c. 74, the tenant in tail, subsequently to the mortgage, and even without reference to it, levied a fine or suffered a common recovery, he would have let in the mortgage, although he declared the use of the fine or recovery to a subsequent mortgagee or purchaser without notice. If the first mortgage was in fee, a subsequent legal common recovery would not have been valid without the concurrence of the mortgagee or his heirs, for the want of a good tenant of the freehold. But on the principle of there being no degrees of estates in equity, it was decided that if an equitable tenant in tail made a mortgage, he might suffer a recovery without the concurrence of a mortgagee (b). Since the passing of the statute, the mortgage of a tenant in tail will be also let in by his deed duly enrolled in pursuance of the statute, except as against a bona fide purchaser without express notice (c). 1087.

IX. Mortgage by a tenant in tail.

X. Where a person affects to make a mortgage, but the deed is defective, further assurance will be enforced in

X. Defective mortgage.

(a) 2 Spence's Eq. Jur. 634 ;  
*Looking v. Parker*, L. R. 8 Ch. Ap.  
30.

(b) *Coote Mortg.*, 3rd ed. 179, 190,  
335.

(c) *Coote Mortg.*, 3rd ed. 335.

Pr. II. T. 10,  
Ch. 2, s. 1.

equity (*a*). If a man, after making a defective mortgage to one person, makes a mortgage by an assurance which is effectual to another person, the second shall prevail, if he lent his money on the security of the land and without notice; because he has equal equity and the legal title (*b*). But (except so far at least as the stat. 1 Vict. c. 110, may alter the case) a defective mortgage would prevail against a mere subsequent judgment creditor, who is in the nature of a volunteer as regards his lien on the land (*c*). 1088.

XI. Pay-  
ment of  
debt.

XI. A mortgagee, whose money is not paid on the day appointed by the proviso, is entitled to six months' notice previously to its being paid; unless he has demanded or taken some steps to compel payment, in which cases no notice is requisite. If the money is not tendered on the day of the expiration of the notice, the mortgagee is entitled to another six months' notice. If the mortgagor refuses to receive his money after due notice, interest will cease from the time of the tender, provided the mortgagor keep the money continually ready and make no profit by it. The first mortgagee is bound to accept payment of his principal, interest, and costs, when tendered by a second mortgagee, and thereupon to convey to him the estate, whether the tender be made with or without the privity of the mortgagor; and generally speaking he is justified in accepting payment and transferring the legal estate to any person who tenders the principal, interest, and costs due to him, if such person is interested in the equity of redemption (*d*). 1089.

If the condition is for payment to the mortgagee, his heirs or his executors, the mortgagor, after the death of the mortgagee and before forfeiture, may pay either the heir or

(*a*) 2 Spence's Eq. Jur. 639.

(*c*) 2 Spence's Eq. Jur. 639, 640.

(*b*) 2 Spence's Eq. Jur. 639;  
Coote Mortg., 3rd ed. 190.

(*d*) 2 Spence's Eq. Jur. 652, 653;  
Coote Mortg., 3rd ed. 441—528.



the executor, as he pleases. But after forfeiture, the money is to be paid to the executor. And even if paid to the heir before forfeiture, it belongs to the executor; because, whatever may be the form of a mortgage, a Court of Equity considers a mortgage debt as part of the mortgagee's personalty: the money came from that source, and is to be returned to it, unless he directs the contrary (a). 1090.

PR. II. T. 10.  
CH. 2, s. 1.

Where an agreement for a mortgage contains a stipulation that the principal money shall not be called in for a certain time, the postponement is conditional on punctual payment of interest (b). 1091.

If a mortgagor pays off the principal to the solicitors of the mortgagee, instead of the mortgagee himself, without having ascertained that they are authorized to receive it, he does so at his own risk. So that if the solicitors misappropriate the money, the mortgagor will remain liable to the mortgagee or his assignee (c). 1092.

And, on the same principle, if the mortgagor has not received the money, the mortgagee cannot maintain the validity of the mortgage deed, by showing that he paid the money to the mortgagor's solicitor, unless the mortgagee can show that the mortgagor's solicitor was expressly authorized by the mortgagor to receive the money. And the mere fact that the mortgagor's solicitor is in possession of a mortgage deed executed by the mortgagor does not authorize the mortgagor's solicitor to receive the money for the mortgagor (d). 1092a.

[In cases where consideration is to be paid or given after the 31st day of December, 1881, stat. 44 & 45 Vict. c. 41, s. 56 (Appendix), now enacts, "Where a solicitor produces a deed, having in the body thereof or indorsed thereon a

Receipt in  
deed or  
indorsed,  
authority  
for payment  
to solicitor.

(a) 2 Spence's Eq. Jur. 650, 651; Coote Mortg., 3rd ed. 509; supra, par. 997 a.

(c) *Willington v. Tate*, L. R. 4 Ch. Ap. 288.

(b) *Seaton v. Twyford*, L. R. 11 Eq. 591,

(d) *Ex parte Swinbanks. In re Shanks*, L. R. 11 Ch. D. (Ap.) 525.

Pr. II. T. 10,  
Ch. 2, s. 1.

— — — receipt for consideration money or other consideration, the deed being executed, or the indorsed receipt being signed, by the person entitled to give a receipt for that consideration, the deed shall be sufficient authority to the person liable to give or pay the same for his paying or giving the same to the solicitor, without the solicitor producing any separate or other direction or authority in that behalf from the person who executed or signed the deed or receipt." But it has been held that this section only authorizes payment to a solicitor for trustees who have power to authorize him to receive purchase money (a).] 1092b.

Where several estates or parts of estates are comprised in one mortgage, and they become vested by devise, descent, or otherwise, in several persons, each estate or part of an estate mortgaged shall, according to its value, contribute proportionally to keep down the interest or to pay off the principal. And so it is with different persons having distinct limited interests in an estate which is under mortgage (b). 1093.

XII. Equity  
of redemption  
subject  
to old uses  
or trusts.

XII. Where an estate is mortgaged, the equity of redemption, unless there appears a clear intention of making a new settlement, remains subject to the old uses or trusts to which the land was subject before the mortgage (c). And the mere form of reservation of the equity of redemption is often not of itself sufficient to alter the previous title. It is frequently supposed to arise from inaccuracy or mistake (d). Thus, where a husband is seised jure uxoris, and he and his wife join in a mortgage, reserving the equity of redemption to him and his heirs, he has the equity of redemption jure uxoris, as he before had the legal estate, unless it is evident that the transaction is more than a mere mortgage, or the limitation of the estate is perfectly distinct from the equity of redemption (e). But at the

(a) *Re Bellamy*, L. R. 24 Ch. D. 260; *In re Betton's Trust Estates*, L. R. 12 Eq. 553.

(b) Story's Eq. Jur. § 484, 485; 2 (d) 1 Sngd. Pow. 349, 350.

Spence's Eq. Jur. 837. (e) 2 Spence's Eq. Jur. 306, 644;

(c) *Wood v. Wood*, 7 Beav. 187; *Coote Mortg.*, 3rd ed. 523, 524; see also *Eddleston v. Collins*, 3 D. M. &

same time the intention to alter the previous title may be manifested by the language of the proviso itself, and there is no necessity for an express declaration or a recital to that effect (a). 1094.

Pr. 11, T. 10,  
Ch. 2, s. 1.

Where a mortgage is made of the wife's lands, to secure money borrowed by the husband—and in the absence of evidence to the contrary, the loan will be presumed to have been obtained for his purposes—his estate, especially where he covenants to pay the debt, is made to pay the mortgage money, at the instance of the heir of the wife as well as of the wife herself; though the husband may have paid off the mortgage, and taken an assignment in trust for himself, his executors, etc.; and though by consequence legacies given by the husband may be defeated: for the wife joining in the security does not make it less the debt of the husband, and her estate is considered as surety only for the debt (b). 1095.

XIII. After notice of a second mortgage, the first mortgagee is answerable to the second for the rents and profits he has received or might have received (c). And where the mortgagee enters, and then permits the mortgagor to receive the rents, he will be accountable, as mortgagee in possession, to a subsequent incumbrancer, of whose incumbrance he had notice (d). 1096.

XIII. First mortgagee answerable to second.

XIV. The registration of a deed is not notice of it (e); and consequently, if, subsequently to a registered assignment of a mortgage, payments are made by the mortgagor to the mortgagee, without notice of the assignment, they must in account be allowed by the assignee. And if a mortgagee, having a legal estate under a deed duly regis-

XIV. Registration not notice.

G. 1; *Whitbread v. Smith*, Id. 727; *Heather v. O'Neil*, 2 D. & J. 399.

Beav. 434, as a case to which this doctrine did not apply.

(a) *Atkinson v. Smith*, 3 D. & J. 186, 192.

(c) 2 Spence's Eq. Jur. 648.

(d) 2 Spence's Eq. Jur. 806.

(b) 2 Spence's Eq. Jur. 841, 842; *Cootte Mortg.*, 3rd ed. 485. See *Scholarfield v. Lookwood* (No. 1), 32

(e) See *infra*, Part III. Tit. 12, Ch. 6, s. 3.

Pr. II. T. 10,  
Ch. 2, s. 1.

tered, makes further advances, he will in England have preference over an intermediate incumbrancer or purchaser of whose title he has not notice, although the intermediate deed of sale or charge be duly registered. And if a subsequent mortgagee obtains the legal estate, he will in England have preference over a prior equitable incumbrance duly registered, of which he had not notice (a). 1097.

XV. Assign-  
ment of  
mortgage.

XV. An assignment of a mortgage is an assignment of the debt. It is not necessary that notice should be given to the mortgagor (b). But an assignment should not in any case be taken of a mortgage without inquiry of the mortgagor as to the sum really due; for the assignee takes subject to the account between the mortgagor and the mortgagee, although no receipt be indorsed on the mortgage deed for any part of the mortgage money which has been actually paid off (c). 1098.

The assignee of a mortgagee cannot stand in any different character or hold any different position from that of the mortgagee himself (d). 1099.

If a mortgagee in possession assigns over his mortgage without the assent of the mortgagor, the mortgagee is still bound to answer for the profits both before and after the assignment, though assigned only for his own debt; for he is under a trust to answer for the profits of the pledge (e). 1100.

Where a person who has obtained a mortgage without consideration transfers it to a third person who has no notice of the want of consideration, neither the transferor nor the transferee can enforce it, but it will be ordered to be cancelled (f). 1101.

(a) Coote Mortg., 3rd ed. 378.

(b) 2 Spence's Eq. Jur. 655;  
Sugd. Concise View, 137. *Willing-*  
*ton v. Tate*, L. R. 4 Ch. Ap. 288.

(c) Sugd. Concise View, 137.

(d) *Walker v. Jones*, L. R. 1

P. C. 50. See *Pease v. Jackson*,  
L. R. 3 Ch. Ap. 576.

(e) 2 Spence's Eq. Jur. 656;  
Coote Mortg., 3rd ed. 366.

(f) *Parker v. Clarke*, 30 Beauv.  
54.

Where a mortgagor and mortgagee join in conveying the mortgaged premises to a new mortgagee, the old mortgage *may* not be extinguished, as regards priority over a subsequent incumbrance, though the old mortgage debt be paid off by the new mortgagee, and though there be a new covenant by the mortgagor, and a new proviso for redemption, and though there be no assignment of the old mortgage debt, if the operative words extend in the usual way to all the right and title of the old mortgagee in the premises (a). Indeed, if a person pays off a first mortgage, and takes the deeds and a new mortgage without notice of a second equitable mortgage, he will be entitled to priority over the second equitable mortgagee who had notice of the first mortgage (b). 1102.

Pr. II. T. 10,  
Ch. 2, s. 1.

XVI. The purchaser of a mortgage, as a general rule, has a right to claim, against the mortgagor and all deriving title under him, the full amount of what is due on the security, whatever he may have given; for as he takes the risk, so he is allowed the gain, if any. But if an heir, trustee, agent, or executor of the mortgagor purchases, he can only claim the amount which he gave; unless he has bought in that security to protect one of his own (c). 1103.

XVI. What purchaser of a mortgage has a right to claim.

XVII. A gift of mortgage security, is a gift of all the testator's interest in the money and the security (d). 1104.

XVII. Gift of mortgage security.

XVIII. [In cases of death before the 1st of January, 1882,] where a testator devises all his real estates, whatsoever and wheresoever, the legal estate in mortgaged premises will pass by the will, unless a different intention is to be collected from the context. But a general devise of lands will not of itself have the effect of carrying the beneficial interest in a mortgage (e). [In cases of death after the 31st

XVIII. Devise by a mortgagee.

(a) *Phillips v. Gutteridge*, 4 D. & J. 531.

*Hobday v. Peters* (No. 1), 28 Beav. 349.

(b) *Pease v. Jackson*, L. R. 3 Ch. Ap. 576.

(d) 2 Spence's Eq. Jur. 655.

(e) 2 Spence's Eq. Jur. 655; 1

(c) 2 Spence's Eq. Jur. 657, 739;

Jarm. Wills, 2nd ed. 588; *Bowen*

Pr. II. T. 10,  
Ch. 2, s. 1.

of December, 1881, the legal estate in mortgaged property devolves, notwithstanding any testamentary disposition, on the personal representatives or representative from time to time of the mortgagee (a).] 1105.

XIX. Right  
of purchaser  
of equity of  
redemption.

XIX. Generally speaking, a purchaser of an equity of redemption, with notice of subsequent incumbrances, stands in the same situation, as regards the subsequent incumbrancers, as if he had himself been the mortgagor. And where a second equitable mortgagee, who becomes such without notice of the first equitable mortgage, afterwards, with notice of the first incumbrance, obtains the legal estate from the mortgagor, he holds the legal estate subject to the first incumbrance (b). 1106.

Right of  
second  
equitable  
mortgagee.

XX. Extinguishment  
of the  
mortgage  
debt by  
cancelling.

XX. If a mortgagee cancels a mortgage, and it is found so in his possession on his death, it is as much a release as cancelling a bond; but it does not convey or revest the estate in the mortgagor, for that must be done by a deed: the legal estate, in such a case, [on the death of the mortgagee, on or before the 31st of December, 1881, descended upon the heir, and there being no debt at law or in equity, at least upon the mortgage, the Court held the heir to be a trustee for the mortgagor (c). But in cases of death after the 31st of December, 1881, the estate vests in the personal representatives, or representative from time to time of the mortgagee (d).] 1107.

XXI. Or by  
payment,

or by  
merger.

XXI. If the debt is paid off, the mortgage is extinguished in equity, and the mortgagee is deemed a trustee for the mortgagor (e). And an extinguishment of the mortgage debt will take place where the mortgagee becomes the absolute owner of the equity of redemption; for then the equitable estate merges in the legal; unless

v. *Barlow*, L. R. 11 Eq. 454; 8 Ch. Ap. 171; *In re Packman and Moss*, L. R. 1 Ch. D. 214. See *infra*, Part III. Tit. 15, Ch. 2, s. 2.

(a) *Supra*, par. 997a.

(b) 2 Spence's Eq. Jur. 746.

(c) 2 Spence's Eq. Jur. 749.

(d) *Supra*, par. 997a.

(e) 2 Spence's Eq. Jur. 640.

it was apparently his intention, or it is manifestly for his interest, to keep the incumbrance alive (a). 1108.

Pr. II. T. 10.  
Ch. 2, s. 1.

XXII. The mortgagee cannot be compelled to reconvey until the money is in pocket : payment into Court is not sufficient (b). 1109.

XXII. Reconveyance.

By the stat. 7 & 8 Vict. c. 76, s. 9, it is enacted, "that when any person entitled to any freehold or copyhold land by way of mortgage has or shall have departed this life, and his executor or administrator is or shall be entitled to the money secured by the mortgage, and the legal estate in such land is or shall be vested in the heir or devisee of such mortgagee, or the heir, devisee, or other assign of such heir or devisee, and possession of the land shall not have been taken by virtue of the mortgage, nor any action or suit be depending, such executor or administrator shall have power, upon payment of the principal money and interest due to him on the said mortgage, to convey by deed or surrender (as the case may require) the legal estate which became vested in such heir or devisee; and such conveyance shall be as effectual as if the same had been made by any such heir or devisee, his heirs or assigns." But by the stat. 8 & 9 Vict. c. 106, s. 1, this enactment is repealed from the 1st of October, 1845, and it only commenced from the beginning of the same year (c). 1110.

It is enacted, however, by the stat. 13 & 14 Vict. c. 60, s. 19, "that when any person to whom any lands have been conveyed by way of mortgage shall have died, without having entered into the possession or into the receipt of the rents and profits thereof, and the money due in respect of such mortgage shall have been paid to a person entitled to receive the same, or such last-mentioned person shall consent to an order for the reconveyance of such lands, then in any of the following cases it shall be lawful for the

(a) Story's Eq. Jur. § 1035, b. See  
*Hayden v. Kirkpatrick*, 34 Beav. 645.

(b) 2 Spence's Eq. Jur. 653.

(c) See 7 & 8 Vict. c. 76, s. 13.

Pr. II. T. 10,  
Ch. 2, s. 1.

Court of Chancery to make an order vesting such lands in such person or persons, in such manner and for such estate, as the said Court shall direct ; (that is to say) 1. When an heir or devisee of such mortgagee shall be out of the jurisdiction of the Court of Chancery, or cannot be found ; 2. When an heir or devisee of such mortgagee shall, upon a demand by a person entitled to require a conveyance of such lands or a duly authorised agent of such last-mentioned person, have stated in writing that he will not convey the same, or shall not convey the same for the space of twenty-eight days next after a proper deed for conveying such lands shall have been tendered to him by a person entitled as aforesaid, or a duly authorised agent of such last-mentioned person ; 3. When it shall be uncertain which of several devisees of such mortgagee was the survivor ; 4. When it shall be uncertain as to the survivor of several devisees of such mortgagee, or as to the heir of such mortgagee, whether he be living or dead ; 5. When such mortgagee shall have died intestate as to such lands, and without an heir, or shall have died and it shall not be known who is his heir or devisee : and the order of the said Court of Chancery made in any one of the foregoing cases shall have the same effect as if the heir or devisee or a surviving devisee, as the case may be, had duly executed a conveyance or assignment of the lands in the same manner and for the same estate." And by s. 20, the Court is enabled to appoint a person to convey or assign, should it be deemed more convenient than a vesting order. 1111.

Stat. 44 & 45  
Vict. c. 41,  
s. 15.  
The Con-  
veyancing  
and Law of  
Property  
Act, 1881.  
Obligation  
on mort-  
gagee to  
transfer

[With respect to a mortgagee who is not, or has not been in possession, it is enacted by stat. 44 & 45 Vict. c. 41, s. 15 (Appendix), that "Where a mortgagor is entitled to redeem, he shall, by virtue of this Act, have power to require the mortgagee, instead of re-conveying, and on terms on which he would be bound to re-convey, to assign



the mortgage debt and convey the mortgaged property to any third person, as the mortgagor directs ; and the mortgagee shall, by virtue of this Act, be bound to assign and convey accordingly." And this provision is extended by stat. 45 & 46 Vict. c. 39, s. 12 (Appendix), which enacts, "The right of the mortgagor, under s. 15 of the Conveyancing Act of 1881, to require a mortgagee, instead of re-conveying, to assign the mortgage debt and convey the mortgaged property to a third person, shall belong to and be capable of being enforced by each incumbrancer, or by the mortgagor, notwithstanding any intermediate incumbrance ; but a requisition of an incumbrancer shall prevail over a requisition of the mortgagor, and, as between incumbrancers, a requisition of a prior incumbrancer shall prevail over a requisition of a subsequent incumbrancer." ] 1111a.

Pr. II. T. 10,  
CH. 2, s. 1.

instead of  
reconveying.

Stat. 45 & 46  
Vict. c. 39,  
s. 12.  
The Con-  
veyancing  
Act, 1882.

By the stat. 37 & 38 Vict. c. 78, s. 4, "the legal personal representative of a mortgagee of a freehold estate, or of a copyhold estate to which the mortgagee shall have been admitted, may, on payment of all sums secured by the mortgage, convey or surrender the mortgaged estate, whether the mortgage be in form an assurance subject to redemption, or an assurance upon trust." [But as regards cases of death after the 31st of December, 1881, this provision is now repealed by stat. 44 & 45 Vict. c. 41, s. 30 (Appendix), and the mortgaged estate, notwithstanding any testamentary disposition by the mortgagee, devolves to and becomes vested in his personal representatives or representative from time to time (a).] 1112.

Legal  
personal  
represent-  
ative may  
convey legal  
estate of  
mortgaged  
property.

By the stat. 18 Vict. c. 15, s. 11, "where any legal or equitable estate or interest, or any disposing power in or over any lands, tenements, or hereditaments, shall, under any conveyance or other instrument executed after the passing of this Act, become vested in any person as a

Judgments,  
etc., against  
mortgagees  
who have  
been paid  
off.

(a) Supra, par. 997a.

Pr. II. T. 10.  
Ch. 2, s. 1.

purchaser or mortgagee for valuable consideration, such lands, tenements, or hereditaments, shall not be taken in execution under any writ of elegit, or other writ of execution, to be sued upon any judgment, or any decree, order, or rule against any mortgagee or mortgagees thereof, who shall have been paid off prior to or at the time of the execution of such conveyance, nor shall any such judgment, decree, order, or rule, or the money thereby secured be a charge upon such lands, tenements, or hereditaments, so vested in purchasers or mortgagees, nor shall such lands, tenements, or hereditaments so vested in purchasers or mortgagees be extended or taken in execution, or rendered liable under any writ of extent or writ of execution or other process issued by or on behalf of Her Majesty, her heirs or successors, in respect of any judgment, statute, or recognisance obtained against or entered into by, or inquisition found against, or obligation or specialty made by, or acceptance of office by any mortgagee or mortgagees, whereby he or they hath or have become or shall become a debtor or accountant, or debtors or accountants to the Crown, where such mortgagee or mortgagees shall have been paid off prior to or at the time of the execution of such conveyance as aforesaid." 1113.

In consequence of this enactment, where mortgagees are paid off prior to or at the time of the execution of any conveyance or subsequent mortgage, creditors having judgments against such mortgagees need not concur in such conveyance or subsequent mortgage (a). 1114.

XXIII. Where a person makes a mortgage in fee, and dies intestate without heirs, the equity of redemption does not escheat to the Crown, but belongs to the mortgagee, subject to the debts of the mortgageor (b). 1115.

XXIII.  
Death of  
mortgagor,  
intestate,  
and without  
heirs.

Right of

As the personal representatives are entitled to the money,

(a) *Greaves v. Wilson* (No. 2),  
25 Beav. 434.

(b) *Beale v. Symonds*, 16 Beav.  
406.

and as the land is in equity a pledge for the payment, it follows, that, if the pledge is forfeited, the personal representative must be also entitled to the land composing the pledge; and therefore [upon the death of the mortgagee on or before the 31st of December, 1881, if his heir obtains a release of the equity of redemption, or the land becomes irredeemable from length of time, it will nevertheless belong to the personal representative, and the heir will be a trustee for him. And now if the mortgagee dies after the 31st of December, 1881, the land will devolve to and become vested in his personal representatives or representative from time to time (a).] 1116.

Pr. II. T. 10.  
Ch. 2, s. 1.  
executors of  
mortgages  
to estate.

[With reference to statutory mortgages under stat. 44 & 45 Vict. c. 41, see ss. 26—29 of that Act, and also Part I. of the third schedule thereto in the Appendix.] 1116a.

Statutory  
mortgages  
under Stat.  
44 & 45 Vict.  
c. 41.  
The Con-  
veyancing  
and Law of  
Property  
Act, 1881.

## SECTION II.

### *Of Equitable Mortgages.*

Besides mortgages created by a formal instrument, and valid at law, as well as in equity, there are equitable mortgages. These are created either by a written instrument, or by a deposit of deeds or copies of court roll, with or without writing (b). Any written agreement or directions or other instrument in writing, showing that it was the intention of a debtor thereby to make his land or other property a security for the debt, will be equivalent in equity to an actual mortgage by deed or to a pledge (c). And a deposit of all or some of the material deeds or documents of title constitutes an equitable mortgage, though they do not show a good title in the depositor (as where

Pr. II. T. 10.  
Ch. 2, s. 2.  
How  
created.

(a) *Supra*, par. 997a.

(b) 2 Spence's Eq. Jur. 777;  
Coote Mortg., 3rd ed. 165; *Fenwick*  
v. *Potts*, 8 D. M. & G. 506; *Daw* v.

*Terrell*, 33 Beav. 218; *Dixon* v.  
*Muckleston*, L. R. 8 Ch. Ap. 155.

(c) 2 Spence's Eq. Jur. 777—  
779.

P. 174. they do not comprise the conveyance to him), if made with a creditor, or with some third person on his behalf, whether with or without any written memorandum, and even without a word passing, and whether as security for an antecedent debt, or on a fresh loan of money, if received by him (so far as it would appear) in good faith, and in the belief that they were the title deeds of the estate (a). Such deposit is of itself evidence of an agreement for a legal mortgage of the estate, of which agreement the creditor may avail himself, in equity, as of an agreement in writing for that purpose. And if, by agreement, a vendor keeps the title deeds and conveyance of the estate to the purchaser in his own custody, as a security for the purchase money unpaid, he has an equitable mortgage on the estate (b). And an equitable mortgagee may himself create an equitable mortgage by depositing the deeds with a third person, although he does not deliver over the memorandum (c). 1117.

The meaning and object of the deposit may be explained by parol evidence. And evidence is admissible to show that a delivery of deeds to a third person, by a person not being the party whose estate is sought to be charged, even though no money passed at the time, constituted an equitable mortgage (d). 1118.

Further  
advances.

The deposit will cover subsequent advances, if it clearly appear that they were made upon the faith of that security, or that the original deposit was continued with an agreement for a further advance (e). 1119.

Where the Court is satisfied of the good faith of the person who has got a prior equitable charge, and that he was led to believe that he had got the necessary deeds,

(a) Story's Eq. Jur. § 1020; 2 Spence's Eq. Jur. 781; Coote Mortg., 3rd ed. 165, 169; *Lacon v. Allen*, 3 Drewry 579; *Roberts v. Croft*, 24 Beav. 223; 2 D. & J. 1.

(b) Sugd. Concise View, 536.

(c) Coote Mortg., 3rd ed. 173.

(d) 2 Spence's Eq. Jur. 784.

(e) 2 Spence's Eq. Jur. 781; Coote Mortg., 3rd ed. 171.

the Court will not hold that he was bound to examine the deeds. And if he does not, and they do not show any title in the mortgagor, yet such equitable mortgagee is entitled to priority, even over a second equitable mortgagee, without notice, who has deeds which show a complete title in the mortgagor, and has a memorandum of deposit (a). This is only defensible on the ground of public convenience, in facilitating loans by means of equitable mortgages. It illustrates the great danger of lending on such securities. **1120.**

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CH. 2, S. 2.

An equitable mortgagee by deposit of title deeds will have preference over a subsequent purchaser or mortgagee of the legal estate with notice, but not over a subsequent purchaser or mortgagee, who has the legal estate, and had no notice of such equitable mortgage (b). **1121.**

Priority.

An equitable deposit, with memorandum of charge, by a devisee, is an alienation which pro tanto prevents a creditor of the testator from subsequently obtaining a charge on the estate, as assets under the stat. 3 & 4 Will. 4, c. 104 (c). **1122.**

An equitable incumbrancer on property, who has distinct notice of a prior incumbrance, cannot, by concealing his knowledge from his assignee, give such assignee a better right than that which he himself possesses (d). **1123.**

Where a trustee of funds invested on mortgage in his own name deposits the deeds without notice of the trust, to secure an advance to himself, the cestuis que trust are entitled to priority over the equitable mortgagee, and to delivery up of the deeds (e). **1124.**

An equitable mortgagee by deposit is a purchaser within the stat. of 27 Eliz. c. 4, so as to avoid a prior voluntary settlement in equity, though not at law. So he may avoid

- (a) *Dixon v. Muckleston*, L. R. 8 Ch. Ap. 155.      (d) *Ford v. White*, 16 Beav. 125.  
 (b) *Coote Mortg.*, 3rd ed. 170.      (e) *Newton v. Newton*, L. R. 6 Eq. 135.  
 (c) *British Mutual Investment*

*Co. v. Smart*, L. R. 10 Ch. Ap. 567.

**Pr. II. T. 10,** such a settlement as a creditor under the 13 Eliz. c. 5, if  
**Cu. 2, s. 2.** he was a creditor at the time of the settlement (a). 1125.

**Fixtures.** Under an equitable mortgage of a lease, even by a mere deposit without any memorandum, the tenant's fixtures will be included (b). 1126.

**Interest.** Where a simple contract debt has been secured by a deposit of deeds, unaccompanied by any stipulation as to interest, or any memorandum from which an exclusion of interest can be inferred, the mortgagee is entitled to interest at the rate of 4 per cent., on the principle that a deposit of deeds to secure a loan is to be considered as an agreement to execute a mortgage of the property comprised in the deeds, with interest (c). 1127.

### SECTION III.

#### *Of Mortgages of Personal Property.*

**Pr. II. T. 10,** I. A mortgage of personal property is a transfer of the  
**Cu. 2, s. 3.** ownership itself, subject to be defeated by the performance of the condition within a certain time. But a pledge only passes the possession, or at most a special property to the pledgee, with a right of retainer till the debt is paid or the engagement is fulfilled (d). 1128.

I. A mortgage and a pledge distinguished from each other.

**Stock.** Public stock may become the subject of loan, or it may be of itself the security for the repayment of money (e). And a contract for the transfer of stock is good, though the transferor is not possessed of it at the time (f). 1129.

**Non-delivery of possession.** If the assignor retains possession of chattels comprised in an assignment, or bill of sale, as it is technically termed, this is *prima facie* a badge of fraud, as against creditors.

(a) Coote Mortg., 3rd ed. 170.

(b) *Williams v. Evans*, 23 Beav. 239.

(c) *In re Kerr's Policy*, L. R. 8 Eq. 331.

(d) Story's Eq. Jur. § 1030; 2 Spence's Eq. Jur. 771.

(e) Coote Mortg., 3rd ed. 274.

(f) *Id.* 276.

But it does not render the transaction fraudulent and void, where it is consistent with the deed ; or where the deed is given to secure the repayment of a debt by instalments, and the deed provides, that, "until default shall be made in payment of all or any of the said sums," the assignor may retain possession (a). 1130.

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Ch. 2, s. 3.

Where the first of two mortgages of personal estate is paid off, and the person who pays it off takes an assignment of such personal estate to secure the repayment of the money advanced by him in paying off the debt to the original creditor, but does not take an assignment of the debt and security, he will not stand in the place of the original creditor as regards priority, because the original security is not kept on foot (b). 1131.

Priority.

II. A mortgage or pledge of personal property may be held till a subsequent debt or advance, without notice of a mesne incumbrance, is paid, as well as the original debt (except so far as bankruptcy may alter the case), on the ground that the mortgagee or pledgee would not have lent the further sum except on the credit of the mortgage or pledge, and that he who seeks equity must do equity. This presumption may, indeed, be rebutted by circumstances ; but unless it is rebutted, it will generally prevail in favour of the lien, against the pledgor himself, although not against his creditors having a specific lien or interest in the property, or against subsequent purchasers of the equity of redemption (c). 1132.

II. Tasking.

A mortgagee, whose security exceeds the debt secured, may apply the balance in payment of any unsecured debt due to him from the mortgagor, as against the mortgagor's executors (d). 1133.

Application  
of balance of  
mortgage  
security.

(a) *Martindale v. Booth*, 3 B. & Adol. 498.

infra, Part III. Tit. 12, Ch. 2, s. 11.

(b) *Medley v. Horton*, 14 Sim. 222.

(c) Story's Eq. Jur. § 1034 ; 2 Spence's Eq. Jur. 772, 773.

As to the effect of notice, or want of notice, as regards priority, see

(d) *In re Haselfoot's Estate*, L. R. 13 Eq. 327.

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Ch. 2, s. 3.

III. Mort-  
gagor's right  
to redeem,  
and mort-  
gagee's right  
to sell.

III. A mortgagor of personal property may redeem, if he proceeds within a reasonable time. But, on the other hand, the mortgagee may either sell the property on due notice, though no power of sale may have been given him, or he may foreclose (a). The reason would appear to be, that other things of the same kind, and of the very same worth, even to the party himself, may be purchased for the sum which the articles in question fetch. 1134.

IV. Indem-  
nity.

IV. If a person transfers his shares in a company by way of mortgage, and the mortgagee, as registered owner, becomes liable for calls or other payments, he cannot compel his mortgagor to indemnify him, unless he comes to redeem (b). 1135.

V. Mortgage  
of a ship.

V. A mortgage or transfer of a mortgage of a British ship or any share in her must be in a specified form, under seal, and attested, and registered; and the date and hour of its entry must be indorsed upon it. 1136.

In case more than one mortgage of the same ship or share is registered, the mortgagees, notwithstanding any notice, have priority according to the date of registration. Every registered mortgagee may dispose of the ship or share mortgaged; but no subsequent mortgagee may do this, without the concurrence of every prior registered mortgagee, except under the order of some competent Court (c). 1137.

By a first mortgage of a ship, even before registration, the mortgagee acquires the legal ownership of it, and has a right to take possession. And under s. 69 of the 17 & 18 Vict. c. 104, the only effect of the omission to re-

(a) Story's Eq. Jur. § 1081; 2 Spence's Eq. Jur. 637; Coote Mortg., 3rd ed. 279, 500; [but in *Carter v. Wake*, L. R. 4 Ch. D. 605, Sir G. Jessel, M.R., held that the pledgee of personal chattels has no right to

foreclose.]

(b) 2 Spence's Eq. Jur. 774.

(c) Sm. Merc. Law, 9th ed. 187; Mau. & Pol. 33—5; 17 & 18 Vict. c. 104, ss. 66, 69, 71.



gister a mortgage is to postpone it to a subsequent mortgage or transfer which is registered before such first mortgage. As regards other parties, the unregistered prior mortgagee is complete owner, though of course subject to redemption. Subsequent mortgagees will only acquire the interest left to the mortgagor, or, in other words, his right to redeem. And the first mortgagee will have the right to the freight earned by the ship, as against equitable assignee of the cargo, without notice of the first mortgagee's title (a). 1138.

A certificate of mortgage may be granted by the registrar to the owners of a ship, allowing a mortgage out of the country where the ship is registered. And the mortgage, when made, is to be indorsed, by a registrar or British consular officer, on the certificate of mortgage (b). 1139.

Prior to the stat. 25 & 26 Vict. c. 63, s. 3, an equitable mortgage was invalid (c), but by that enactment, "equities may be enforced against owners and mortgagees of ships, in respect of their interest therein, in the same manner as equities may be enforced against them in respect of any other personal property." 1140.

The mortgagee of a ship is entitled to the accruing freight from the time he takes possession (d). A security valid in equity may be given upon freight to be earned or a cargo to be acquired (e). 1141.

The first registered mortgagee of a ship, by taking possession of her before the freight is completely earned, obtains a legal right to receive the freight, and to retain thereout not only what is due on his first mortgage, but also the amount of any subsequent charge which he may have acquired on the freight, in priority to every equitable

(a) *Keith v. Burrows*, L. R. 1 C. P. D. 722; 2 Ap. Cas. 636.

(b) Sm., Merc. Law, 9th ed. 189; Mau. & Pol. 36; 17 & 18 Vict. c. 104, ss. 76—80.

(c) *Liverpool Borough Bank v. Turner*, 2 D. F. & J. 502; *Keith v. Burrows*, L. R. 2 Ap. Cas. 636.

(d) 2 Spence's Eq. Jur. 775.

(e) 2 Spence's Eq. Jur. 715.

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Ch. 2, s. 3.

charge of which he had no notice; and it makes no difference that a subsequent incumbrancer was the first to give notice to the charterers of his charge on the freight (a). 1142.

The transmission of a mortgage, by death, bankruptcy, marriage, etc., must be registered (b). 1143.

When a mortgage is discharged, satisfaction is to be entered on the registry (c). 1144.

(a) *Liverpool Marine Credit Co.* 104, ss. 73—75.  
v. *Wilson*, L. R. 7 Ch. Ap. 507.

(b) Sm. Merc. Law, 9th ed. 190; Mau. & Pol. 35; 17 & 18 Vict. c.  
(c) Sm. Merc. Law, 9th ed. 190; Mau. & Pol. 37; 17 & 18 Vict. c.  
104, s. 68.

## CHAPTER III.

OF INTERESTS UNDER STATUTES MERCHANT, STATUTES  
STAPLE, RECOGNISANCES, JUDGMENTS, DECREES, ORDERS,  
AND RULES OF COURT, AND ELEGIT.

A STATUTE merchant is a bond or contract upon record, under the hand and seal of a debtor, publicly acknowledged before the mayor of the place, and attested by the Royal seal (*a*). 1145.

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Statute  
merchant.

A statute staple is a bond of record acknowledged before the mayor of the staple, and attested by the seal of the staple (*b*). 1146.

Statute  
staple.

The statute staple was only intended for persons concerned in trade; but it became used so universally, that an Act was made in 23 Hen. 8, prohibiting any persons but merchants from taking it. But this Act created a new kind of security, called a recognisance in the nature of a statute staple, which is a bond acknowledged before the Justices of the Queen's Bench or Common Pleas, the mayor of the staple at Westminster, or the recorder of London, and enrolled, upon which the same advantages may be had as upon a statute staple (*c*). The form of a recognisance is this: "That A. B. doth acknowledge to owe to our Sovereign Lady the Queen or to C. D. the sum of 100*l*., with condition to be void on performance of the thing stipulated (*d*). 1147.

Recogni-  
sance in the  
nature of a  
statute  
staple.

(*a*) 2 Cruise T. 14, § 8; Coote Mortg., 3rd ed. 36, 74. This security was created by the statute 11 Edward 1, extended by the statute 13 Edward 1, stat. 3.

(*b*) 2 Cruise T. 14, § 12; Coote  
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Mortg., 3rd ed. 74. This security was created by the statute 27 Edward 3, stat. 2.

(*c*) 2 Cruise T. 14, § 13; Coote Mortg., 3rd ed. 75.

(*d*) 4 Cruise T. 32, c. 8, § 19.

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General  
nature and  
effect of all  
these  
securities.

The statute merchant, the statute staple, and the recognisance in the nature of a statute staple, then, are all recorded acknowledgments of a debt. And in each case, if the debt is not paid by a certain day, the sheriff is authorised to deliver the lands as well as goods of the debtor to the creditor "by a reasonable extent, to hold them until such time as the debt is wholly levied" (a). 1148.

Registry of  
statutes and  
recogni-  
sances.

By the stat. 27 Eliz. c. 4, ss. 7, 8, statutes merchant and statutes staple shall, within six months after they are acknowledged, be entered in a book by the clerk of recognisances; and if not brought to him for that purpose within four months, they shall be void against subsequent purchasers. 1149.

By the Statute of Frauds, 29 Car. 2, c. 3, s. 18, recognisances shall only bind bona fide purchasers from the time of enrolment. And by the stat. 8 Geo. 1, c. 25, recognisances in the nature of a statute staple are required to be enrolled and docketed for the purpose of searches by purchasers and others. And some other regulations have been made respecting them by recent Acts. (See *infra*, par. 1167—8, 1192.) 1150.

Disuse of  
them.

These statutes and recognisances are now disused; but whatever relates to the effect of a statute staple, is still of practical importance, as being applicable to many cases where the Crown is creditor (b). 1151.

Elegit.

It is enacted by the Statute of Westminster 2, 13 Edw. 1, c. 18, that when a debt is recovered or acknowledged, or damages adjudged in the King's Courts, the plaintiff shall have his election either to have a writ of fieri facias, or else that the sheriff shall deliver to him all the chattels of the debtor, saving only his oxen and beasts of the plough, and also one-half of his lands, until the debt shall be levied upon a reasonable price or extent: the word

(a) Burton, § 869 : Coote Mortg., 3rd ed. 76. (b) Burton, § 871.

“price” referring to the chattels, and the word “extent” to the lands. In consequence of this statute, a writ was framed, under which the sheriff first causes the goods and chattels to be appraised by a jury; and if they are insufficient to pay the debt, then the jury put an annual value on the lands, and the sheriff delivers the goods and chattels and a moiety of the land to the creditor, under the old law, or the whole under the new. This writ was called a writ of *elegit*, because the creditor thereby elected to sue out execution against the lands, instead of proceeding at common law against the goods alone by writ of *fiari facias* (a). **1152.**

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Upon the entry of the cognisee into the lands extended, he is called tenant by statute merchant, statute staple, or *elegit* (b). **1153.**

Tenancy by  
statute  
merchant,  
statute  
staple, or  
*elegit*.

In consequence of the word “acknowledged” in the Statute of Westminster 2, it became a common practice when money was borrowed, for the debtor not only to execute a bond to the creditor, but also a warrant of attorney addressed to two or more attorneys, authorising them to acknowledge a judgment for the money, which enabled the creditor to sue out a writ of *elegit* as effectually as if the judgment had been obtained in an adversary suit (c). **1154.**

Warrant of  
attorney to  
confess  
judgment.

Under the stat. 1 & 2 Vict. c. 110, the whole of the lands may be taken, and the remedy of the creditor is in other respects much extended (d). By s. 11, it is enacted, that (subject to a proviso as to purchasers, etc., before the commencement of the Act) “it shall be lawful for the sheriff or other officer to whom any writ of *elegit*, or any precept

Extension  
of the  
creditor's  
remedy by  
stat. 1 & 2  
Vict. c. 110.

(a) 2 Cruise T. 14, § 17; Coote Mortg., 3rd ed. 36, 37; 2 Saund. Rep. 6th ed. by Wms. 98 c and g n (k); Lush's Practice by Steph. 2nd ed. 470; Arch. by Prentice. 9th ed. 633.

(b) 2 Cruise T. 14, § 76.

(c) 2 Cruise T. 14, § 20; Coote Mortg., 3rd ed. 39.

(d) See Sugden's Concise View, 383—386.

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in pursuance thereof, shall be directed, at the suit of any person, upon any judgment which at the time appointed for the commencement of this Act shall have been recovered, or shall be thereafter recovered in any action in any of Her Majesty's superior Courts at Westminster, to make and deliver execution unto the party in that behalf suing of all such lands, tenements, rectories, tithes, rents, and hereditaments, including lands and hereditaments of copyhold or customary tenure, as the person against whom execution is so sued, or any person in trust for him, shall have been seised or possessed of at the time of entering up the said judgment, or at any time afterwards, or over which such person shall at the time of entering up such judgment, or at any time afterwards, have any disposing power which he might without the assent of any other person exercise for his own benefit, in like manner as the sheriff or other officer may now make and deliver execution of one moiety of the lands and tenements of any person against whom a writ of elegit is sued out; which lands, tenements, rectories, tithes, rents, and hereditaments by force and virtue of such execution, shall accordingly be held and enjoyed by the party to whom such execution shall be so made and delivered, subject to such account in the Court out of which such execution shall have been sued out as a tenant by elegit is now subject to in a Court of Equity." 1155.

Judgment  
to operate  
as a charge  
in equity  
on real  
estate.

By s. 13 it is enacted, that (subject to a proviso as to purchasers, etc., before the commencement of the Act) "a judgment already entered up or to be hereafter entered up against any person in any of Her Majesty's superior Courts at Westminster shall operate as a charge upon all lands, tenements, rectories, advowsons, tithes, rents, and hereditaments (including lands and hereditaments of copyhold or customary tenure), of or to which such person shall at the time of entering up such judgment, or at any time after-

wards, be seised, possessed, or entitled, for any estate or interest whatever, at law or in equity, whether in possession, reversion, remainder, or expectancy, or over which such person shall at the time of entering up such judgment or at any time afterwards have any disposing power which he might without the assent of any other person exercise for his own benefit, and shall be binding as against the person against whom judgment shall be so entered up, and against all persons claiming under him after such judgment, and shall also be binding as against the issue of his body and all other persons whom he might without the assent of any other person cut off and debar from any remainder, reversion, or other interest in or out of any of the said lands, tenements, rectories, advowsons, tithes, rents, and hereditaments ; and that every judgment creditor shall have such and the same remedies in a Court of Equity against the hereditaments so charged by virtue of this Act, or any part thereof, as he would be entitled to in case the person against whom such judgment shall have been so entered up had power to charge the same hereditaments, and had by writing under his hand agreed to charge the same with the amount of such judgment debt and interest thereon. Provided that no judgment creditor shall be entitled to proceed in equity to obtain the benefit of such charge until after the expiration of one year from the time of entering up such judgment, or, in cases of judgments already entered up or to be entered up before the time appointed for the commencement of this Act, until after the expiration of one year from the time appointed for the commencement of this Act ; nor shall such charge operate to give the judgment creditor any preference in case of the bankruptcy of the person against whom judgment shall have been entered up, unless such judgment shall have been entered up one year at least before the bankruptcy." But it is provided that nothing therein "contained shall be

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deemed or taken to alter or affect any doctrine of Courts of Equity whereby protection is given to purchasers for valuable consideration without notice." 1156.

A judgment creditor, though unable to proceed in equity to obtain the benefit of his charge before the expiration of a year is, nevertheless entitled to have his life interest of his debtor in lands at once impounded for his protection (a). 1157.

Effect of a  
judgment  
by the old  
law on  
freeholds;

Before the stat. 1 & 2 Vict. 110, a judgment, from the time of being entered up, until a writ of elegit was lodged with the sheriff, was not an actual charge or even a specific lien, but only a general lien on the freehold hereditaments of the debtor arising from the option given him by the Statute of Westminster 2, of enforcing his claim against such hereditaments by suing out a writ of elegit (b). 1158.

on copy-  
holds;  
and on  
terms for  
years.

And copyholds, not being mentioned in the Statute of Westminster, were not affected by judgments (c). And in the case of a term for years, in consequence of the 16th section of the Statute of Frauds (which though it speaks only of "goods" includes terms for years), a judgment was not even a general lien until the writ of execution was lodged with the sheriff (d). 1159.

Effect at law  
under the  
stat. 1 & 2  
Vict. c. 110.

By the operation of s. 11 of the statute of 1 & 2 Vict. c. 110, a judgment, from the time of being entered up, gave a right of execution at law, by elegit, against all the freehold, copyhold, customary, and (it would seem) leasehold hereditaments of to or over which the debtor or any person

(a) *Yescombe v. Landor*, 28 Beav. 80.

(b) *Coote Mortg.*, 3rd ed. 13, 185, 190; *Prid. Judgm.*, 4th ed. 6, 9, 70; *Sugd. V. & P.*, 13th ed. 423; *Atkinson's Sheriff's Law*, 158; *Brace v. Duchess of Marlborough*, 2 P. W. 491; *Neate v. Duke of Marlborough*, 3 My. & Cr. 417; *L. J. Turner*, in

*Benham v. Keane*, 3 D. F. & J. 329.

(c) *Prid. Judgm.*, 4th ed. 6; 1 *Scriv. Copyhs. by Stalm.* 4th ed. 47, 48; 2 *Saund. Rep. by Wms.* 6th ed. 69 a.

(d) *Westbrook v. Blythe*, 3 Ell. & Bl. 737; *Coote Mortg.*, 3rd ed. 56; *Prid. Judgm.*, 4th ed. 11; *Atkinson's Sheriff's Law*, 158.



in trust for him was seised or possessed (a) at the time or afterwards, or had at the time or afterwards any disposing power, which he might without the assent of any other person, exercise for his own benefit. And by the operation of section 13 of the same statute, above quoted, a judgment from the time of being entered up, was an actual charge or specific incumbrance in equity, on all freehold, copyhold, and customary hereditaments, of to or over which the debtor, at the time of entering up judgment or afterwards, was seised, possessed, or entitled, for any estate or interest whatever at law or in equity, or had an absolute disposing power, which, without the assent of any other person, he might exercise for his own benefit (b).

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Effect in  
equity  
under same  
statute.

1160.

Let us proceed to explain more particularly, by way of comment on what has been already stated, the general effect of a judgment, by the law *prior to the stat. 23 & 24 Vict. c. 38.* 1161.

Comments.

Let us first consider the case of freehold hereditaments of the judgment debtor. By the law prior to the stat. 1 & 2 Vict. c. 110, a judgment had different operations at different times. From the time of its being entered up, until a writ of elegit was lodged with the sheriff, it was only a general lien on the freehold hereditaments. The judgment creditor had no estate in the land like a legal mortgagee. He had no actual charge on the land, like an equitable mortgagee, or like a person in whose favour a

First, as to  
freeholds.

(a) See *In re South*, L. R. 9 Ch. Ap. 369, in which the Lord Justice James is reported to have said that a remainder cannot be taken; for a man cannot be "seised or possessed" of a remainder (Id. 373). whereas in the strict, and usual, and proper conveyancing language, he may be, inasmuch as a remainder is in fact a remaining portion of the seisin or ownership. See Smith's

Executory Interests annexed to Fearn, § 50—58; and *supra*, par. 362-7, 812.

(b) *Prid. Judgm.* 4th ed. 63, 70; *Coote Mortg.*, 3rd ed. 44, 55; *Sugd. V. & P.*, 13th ed. 421, 423, 429; *Lewin on Trusts*, 3rd ed. 667; *Atkinson's Sheriff's Law*, 158. But see alterations made by 27 & 28 Vict. c. 112, ss. 1, 2, *infra*, par. 1168.

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sum of money had been made payable out of the land. He had no specific lien on the land ; for the judgment only gave him an option of going against the land : he might choose to sue out a writ of fieri facias, and satisfy himself entirely out of the personal estate. Yet he had a general lien on the land, arising from his option of suing out a writ of elegit against the land. This gave him a sort of hold on the land, not specific, but general in common with the other property of the debtor. The effect of the judgment under the Statute of Westminster, therefore, before an elegit was sued out, was simply to place the land, in common with the other property of the debtor, under potential liability to the debt, in case the creditor thought fit to sue out an elegit. But after an elegit had been lodged with the sheriff, the creditor then had, under the Statute of Westminster, a specific lien on the land. 1162.

Such was the position of the creditor at law before the statute 1 & 2 Vict. c. 110. And that statute did not make any alteration as regards the point, that, *at law*, the creditor before an elegit was sued out, had only a general lien on the land. 1163.

But yet that statute enlarged the creditor's remedies in the case of freehold hereditaments in various respects : first, by the 11th section it extended his remedies at law ; secondly, by the 13th section it conferred upon him new rights in equity. By the 11th section it gave him the right of extending the *whole* of his freehold hereditaments under an elegit, instead of a moiety only. And by the 13th section, the judgment creditor, from the time of the judgment being entered up, had an actual charge or specific incumbrance in equity on all the freehold hereditaments, in the same way as if the debtor had by writing agreed to charge the same with the amount of the judgment debt and interest. 1164.

Secondly, in regard to copyhold or customary hereditaments, these, not being mentioned in the Statute of Westminster, were not affected by judgments; for it is a general principle that where a statute would prejudice the rights of lords of manors, if it were held to extend to copyhold and customary property, it shall not be deemed to extend to them without words for that purpose. But by the stat. 1 & 2 Vict. c. 110, copyhold and customary hereditaments were placed upon the same footing as regards the rights of judgment creditors as freehold hereditaments. 1165.

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Secondly, as  
to copy-  
holds.

Thirdly, in regard to leasehold hereditaments, it is enacted by the Statute of Frauds, 29 Car. 2, c. 3, s. 16, "That no writ of fieri facias or other writs of execution shall bind the property of the goods of the person against whom such writ of execution is sued forth, but from the time that such writ shall be delivered to the sheriff, etc., to be executed." And it has been held that the word "goods" in this section includes "terms for years"; and consequently that a judgment was not even a general lien upon leasehold hereditaments, under the old law, until the writ of execution was lodged with the sheriff. But the stat. 1 & 2 Vict. c. 110, appears to place leasehold hereditaments upon the same footing as freehold hereditaments; for although the 11th section does not mention leasehold hereditaments, yet as it not only uses the expression "seised" but also uses the expression "possessed," and as the expression "possessed" would perhaps be redundant, if not held to refer to leaseholds, and at all events is most properly referential to leaseholds, it would seem that leaseholds are included in s. 11, which relates to the debtor's remedies at law. But whether this is so or not, leasehold hereditaments are certainly included in s. 13 which relates to the debtor's remedies in equity, because it speaks of hereditaments of or to which the debtor is

Thirdly as  
to lease-  
holds.

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“seised, possessed, or entitled, for any estate or interest whatever.” 1166.

23 & 24 Vict.  
c. 38, s. 1.  
Registration  
and putting  
in force of  
execution of  
judgments,  
statutes,  
and recogni-  
sances.

It is enacted, however, by the stat. 23 & 24 Vict. c. 38, s. 1, as follows: “Whereas it is desirable to place freehold, copyhold, and customary estates on the same footing with leasehold estates, in respect of judgments, statutes, and recognisances as against purchasers and mortgagees, and also to enable purchasers and mortgagees of estates, whether freehold, copyhold, or customary, or leasehold, to ascertain when execution has issued on any judgment, statute, or recognisance, and to protect them against delay in the execution of the writ: Be it therefore enacted, that no judgment, statute, or recognisance to be entered up after the passing of this Act shall affect any land (of whatever tenure) as to a bonâ fide purchaser for valuable consideration or a mortgagee (whether such purchaser or mortgagee have notice or not of any such judgment, statute, or recognisance), unless a writ or other due process of execution of such judgment, statute, or recognisance shall have been issued and registered as hereinbefore is mentioned before the execution of the conveyance or mortgage to him, and the payment of the purchase or mortgage money by him: provided always, that no judgment, statute, or recognisance to be entered up after the passing of this Act, nor any writ of execution or other process thereon, shall affect any land of whatever tenure as to a bonâ fide purchaser or mortgagee, although execution or other process shall have issued thereon, and have been duly registered, unless such execution or other process shall be executed and put in force within three calendar months from the time when it was registered.” 1167.

27 & 28 Vict.  
c. 112.

And by the stat. 27 & 28 Vict. c. 112, after reciting that it is desirable to assimilate the law affecting freehold, leasehold, and copyhold estates to that affecting purely personal estates, in respect of future judgments, statutes,

and recognisances, it is enacted by s. 1, that "no judgment, statute, or recognisance to be entered up after the passing of this Act shall affect any land (of whatever tenure) until such land shall have been actually delivered in execution by virtue of a writ of *elegit* or other lawful authority, in pursuance of such judgment, statute, or recognisance." And by s. 2, "In the construction of this Act the term 'judgment' shall be taken to include registered decrees, orders of Courts of Equity and Bankruptcy, and other orders having the operation of a judgment; and the term 'land' shall be taken to include all hereditaments, corporeal or incorporeal, or any interest therein; and the term 'debtor' shall be taken to include husbands of married women, assignees of bankrupts, committees of lunatics, and the heirs or devisees of deceased persons." 1168.

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Future judgments, etc., not to affect land till delivered in execution.

Equitable interests in land are within the 1st section; and the order of the Court will be a delivery in execution within the statute (a). 1169.

Even before the stat. 1 & 2 Vict. c. 110, and down to the time of the passing of the stat. 23 & 24 Vict. c. 38, a judgment bound all the freehold hereditaments of which the debtor was seised at the time when the judgment was entered up, or which he afterwards acquired. And no subsequent act of his, not even alienation for valuable consideration to a purchaser without notice of the judgment, would avoid it; because the purchaser, by searching the register, would have become acquainted with the fact that there was a judgment debt to which the land might become liable; and therefore if he suffered from purchasing an estate of the judgment debtor, he had only himself to blame (b). But an alienation, even in equity alone, prior

Freeholds acquired or aliened after the judgment.

(a) *Hatton v. Haywood*, L. R. 9 Ch. Ap. 229.

*Prid. Judgm.*, 4th ed. 9; *Coote Mortg.*, 4th ed. 43.

(b) 2 Cruise Dig. T. 14, § 48;

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Freeholds  
aliened or  
incumbered  
before the  
judgment.

to the acknowledgment of a judgment was and still is good against it (a). And the enactment in the stat. 1 & 2 Vict. c. 110, that a judgment "shall operate as a charge," means that it shall so operate subject to any equity affecting the estate of the debtor, such as that of a prior equitable mortgagee, or the right of a purchaser under a contract entered into prior to the judgment (b). 1170.

Relative  
position of a  
judgment  
creditor and  
a mort-  
gagee.

Although a judgment creditor has an actual charge in equity under the stat. 1 & 2 Vict. c. 110, s. 13, yet he is not in the position of a mortgagee, even of an equitable mortgagee (c); for until execution, he has no estate in the land, whether legal or equitable: and even a creditor whose debtor has given a warrant of attorney to acknowledge a judgment for a sum of money borrowed at the time, has not the equity of a person who has strictly lent his money on the faith of the land, as his primary security, in the same way as a mortgagee, who takes a conveyance of an estate in the land, or even a mere deposit of the deeds. And a creditor who obtains a judgment by a suit can still less be said to have lent his money on the faith of the land; for he must be taken to have known that if the debtor aliened the land before judgment it would not affect it. 1171.

An equitable mortgagee has priority over a registered subsequent judgment; and if he has made further advances without notice of the judgment, and taken a legal mortgage to secure them, he may tack them to his former advances as against the judgment debt so as to acquire priority in respect of his further advances, by reason of his legal estate (d). 1172.

Estates in  
coparcenary

By the old law (which is unaltered on these points), not

(a) 2 Cruise Dig. T. 14, § 48.

Coote Mortg., 3rd ed. 185, 190;

(b) Sugd. V. & P., 13th ed. 423;

Fisher on Mortg., 419.

Fisher on Mortg. 420—5.

(d) *Croke v. Wilton*, 29 Beav.

(c) Prid. Judgm., 4th ed. 72;

100.

only lands held in severalty, but also lands held in coparcenary or in common, rent charges, and rents in respect of leases, might be extended; as also might a husband's interests in his wife's lands, whether *jure uxoris* or as tenant by the curtesy. But prior to the stat. 1 & 2 Vict. c. 110, a judgment against a tenant in tail was only binding on his life interest, and not as against his issue. And if a judgment was obtained against a joint tenant, and he died before execution, it would not bind the survivor (a). But the judgment now binds the issue in tail, etc., and the surviving joint tenant, under the 13th section. For the case of issue in tail is expressly provided for by that section: and the case of an estate in joint tenancy, though not expressly provided for, appears to be included by the words "any estate or interest whatever." 1173.

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or in common, rents, and marital interests.

Estate tail.

Estate in joint tenancy.

Prior to the Statute of Frauds, equitable estates, not being cognisable at common law, were not extendible on a judgment, statute, or recognisance. By s. 10 of that statute, those equitable estates of which the debtor's trustee was seised for him in severalty at the time of execution might be extended. This was held not to apply to equities of redemption, or to equitable interests in terms for years (b). But a creditor who had sued out execution on a judgment had a lien in equity on an equitable interest in a term of years, or, if sold, on the proceeds, independently of the stat. 1 & 2 Vict. c. 110 (c). And now (so far as the stat. 23 & 24 Vict. c. 38, s. 1, and 27 & 28 Vict. c. 112, s. 1, do not apply), by the 11th section of that Act, equitable interests in terms for years seem to be

Equitable interests.

(a) Archb. by Prentice, 9th ed. 629, 630; Prid., 4th ed. 5—7, 66; Coote Mortg., 3rd ed. 43; 2 Saund. Rep. by Wms. 6th ed. 69 a.

(b) Prid. Judgm., 4th ed. 15—17, 65; Coote Mortg., 3rd ed. 29—31; Lewin on Trusts, 3rd ed. 664—

5; Archb. by Prentice, 9th ed. 630, 631; 2 Saund. Rep. by Wms. 6th ed. 11.

(c) Sugd. V. & P., 13th ed. 417; *Gore v. Bowser*, 3 Sm. & Gif. 1, affirmed on appeal.

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subject to execution at law, and by the 13th section they are clearly subject to a charge in equity, from the time of the judgment being entered up (*a*). But the 11th section does not seem to include, though the 13th section does include, equities of redemption, or other trusts than simple absolute trusts (*b*). 1174.

Power.

Where a person had a fee, subject to a power of appointment given to him by the instrument limiting the fee to him, and he exercised the power, the appointment had the effect of preventing any judgment entered up after the creation of the power from affecting the land as against the appointee; for an appointee is not regarded as taking under the appointment, but as taking immediately under the instrument creating the power, and consequently prior to a judgment entered up before the appointment, but after the deed creating the power. But (except in the case of an appointee who is a purchaser without notice, and who seems to be protected by the stat. 2 Vict. c. 11, s. 5) (*c*), this consequence of the appointment is avoided by the operation of the stat. 1 & 2 Vict. c. 110, s. 11, in giving the judgment creditor a charge in equity in respect of the power itself, where it is exerciseable for the donee's own benefit without the assent of any other person (*d*). 1175.

Judgments entered up against the vendor after contract for sale and before conveyance.

Where land is contracted to be sold, judgment entered up against the vendor after the contract and before conveyance will not (as before intimated) bind the land in the hands of the purchaser. But the judgment is a lien on the unpaid part of the purchase money (*e*). 1176.

(*a*) Lewin on Trusts, 3rd ed. 667; Sugd. V. & P., 13th ed. 421; Prid. Judgm., 4th ed. 62—3.

(*b*) Coote Mortg., 3rd ed. 44; Archb. by Prentice, 9th ed. 630; Prid. Judgm., 4th ed. 70.

(*c*) See *infra*, par. 1202.

(*d*) Sugd. Pow., 7th ed. 33, and V. & P., 13th ed. 429; Prid. Judgm. 33, 66.

(*e*) Prid. on Judgm., 4th ed. 20, 74; Sugd. V. & P., 13th ed. 414, 415; Fisher on Mortg. 420.



Where real estate is devised upon an absolute trust for sale, a judgment against a person entitled to the proceeds of sale does not operate as a charge on the land or the proceeds under the 13th section of the stat. 1 & 2 Vict. c. 110 ; but judgment creditors who have obtained charging or stop orders on the proceeds in Court, have priority according to the dates of such orders (*a*). **1177.**

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Judgments  
against  
persons  
entitled to  
proceeds of  
sale.

Although the 13th section of the stat. 1 & 2 Vict. c. 110 expressly mentions "rectories, advowsons, and tithes," yet it has been held on appeal, in reversal of the decision of the Court below, that a judgment entered up against a beneficed clergyman is not a charge on his benefice under that section (*b*). **1178.**

Judgments  
not a charge  
on benefices.

By the stat. 1 & 2 Vict. c. 110, s. 14, it is enacted, "that if any person against whom any judgment shall have been entered up in any of Her Majesty's superior Courts at Westminster shall have any government stock, funds, or annuities, or any stock, or shares of or in any public company in England (whether incorporated or not), standing in his name in his own right, or in the name of any person in trust for him, it shall be lawful for a judge of the superior Courts, on the application of any judgment creditor, to order that such stock, funds, annuities, or shares, or such of them or such part thereof respectively as he shall think fit, shall stand charged with the payment of the amount for which judgment shall have been so recovered, and interest thereon ; and such order shall entitle the judgment creditor to all such remedies as he would have been entitled to if such charge had been made in his favour by the judgment debtor : provided that no proceedings shall be taken to have the benefit of such charge until after the expiration of six calendar months from the date of such

Charging  
orders.

(*a*) *Thomas v. Cross*, 2 Dr. & Sm. 423.

(*b*) *Hawkins v. Gathercole*, 6 D.

M. & G. 1, overruling the decision of the Court below, 1 Sim. (N. S.) 63;

*Bates v. Brothers*, 2 Sm. & Gif. 509.

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order." And by the stat. 3 & 4 Vict. c. 82, s. 1, "the aforesaid provisions of the said Act shall be deemed and taken to extend to the interest of any judgment debtor, whether in possession, remainder, or reversion, and whether vested or contingent, as well in any such stocks, funds, annuities, or shares as aforesaid, as also in the dividends, interest, or annual produce of any such stock, funds, annuities, or shares; and whenever any such judgment debtor shall have any estate, right, title, or interest, vested or contingent, in possession, remainder, or reversion, in, to, or out of any such stocks, funds, annuities, or shares as aforesaid, which now are or shall hereafter be standing in the name of the Accountant-General of the Court of Chancery, or the Accountant-General of the Court of Exchequer, or in, to, or out of the dividends, interest, or annual produce thereof, it shall be lawful for such judge to make any order as to such stock, funds, annuities, or shares, or the interest, dividends, or annual produce thereof, in the same way as if the same had been standing in the name of a trustee of such judgment debtor: Provided always, that no order of any judge as to any stock, funds, annuities, or shares standing in the name of the Accountant-General of the Court of Chancery, or the Accountant-General of the Court of Exchequer, or as to the interest, dividends, or annual produce thereof, shall prevent the governor and company of the Bank of England, or any public company, from permitting any transfer of such stocks, funds, annuities, or shares, or payment of the interest, dividends, or annual produce thereof, in such manner as the Court of Chancery or the Court of Exchequer respectively may direct, or shall have any greater effect than if such debtor had charged such stock, funds, annuities, or shares, or the interest, dividends, or annual produce thereof, in favour of the judgment creditor, with the amount of the sum to be mentioned in any such order." 1179.

A judge of the Court of Chancery was not a judge of one of the superior Courts at Westminster within the meaning of the 14th section of the stat. 1 & 2 Vict. c. 110 (a). **1180.**

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A charging order cannot have any greater operation than an instrument of charge signed by the debtor against whom the judgment was obtained (b). **1181.**

A person claiming under a mortgage of an equitable interest in stock, made subsequently to a judgment, but before the judgment creditor obtained a charging order under the stat. 1 & 2 Vict. c. 110, s. 14, will have priority over the judgment creditor, notwithstanding the mortgagee did not give notice of his security to the trustee of the fund (c). **1182.**

By s. 17 of the stat. 1 & 2 Vict. c. 110, "every judgment debt shall carry interest at the rate of four pounds per centum per annum from the time of entering up the judgment, or from the time of the commencement of this Act in cases of judgments then entered up and not carrying interest, until the same shall be satisfied; and such interest may be levied under a writ of execution on such judgment." **1183.**

Interest on  
judgment  
debts.

By s. 18, "all decrees and orders of Courts of Equity, and all rules of Courts of Common Law, and all orders of the Lord Chancellor or of the Court of Review in matters of bankruptcy, and all orders of the Lord Chancellor in matters of lunacy, whereby any sum of money, or any costs, charges, or expenses, shall be payable to any person, shall have the effect of judgments in the superior Courts of Common Law; and the persons to whom any such moneys or costs, charges, or expenses shall be payable, shall be

Decrees,  
rules, and  
orders, to  
have effect  
of judgments.

(a) Shelford's Real Property Acts, 547. 20 Eq. 677.

(c) *Scott v. Lord Hastings*, 4

(b) *In re Onslow's Trusts*, L. R. K. & J. 633.

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deemed judgment creditors within the meaning of this Act," etc. **1184.**

A decree for payment of what shall be found due on an account directed is not within this section (a). **1185.**

A rule for taxation of costs, and an allocatur thereon, which is merely a declaration of the Master's judgment as to the amount of costs, do not amount to a rule or order within this section; but a rule absolute for payment of costs does (b). **1186.**

By the stat. 12 & 13 Vict. c. 106, s. 48, the provisions of the stat. 1 & 2 Vict. c. 110, so far as the same relate to orders of the Lord Chancellor, or of the Court of Review therein referred to, in matters of bankruptcy, and the powers given by the same Act to the Lord Chancellor and the Court of Review in matters of bankruptcy, shall extend to and be applicable to orders of the Lord Chancellor and of the Vice-Chancellor in matters of bankruptcy under the stat. 12 & 13 Vict. c. 106. By the stat. 14 & 15 Vict. c. 83, s. 7, the jurisdiction of the Vice-Chancellor in bankruptcy was transferred to the Court of Appeal in Chancery. **1187.**

An order of the Probate Court was not a charge on land within the 1 & 2 Vict. c. 110, s. 13 (c). **1188.**

Registration  
of judg-  
ments,  
decrees,  
orders, and  
rules.

By the stat. 4 & 5 W. & M. c. 20, s. 3, continued by the stat. 6 & 7 W. 3, c. 14, and 7 & 8 W. 3, c. 36, "no judgment not docketed and entered into the books mentioned in the Act shall affect any lands or tenements, as to purchasers or mortgagees, or have any preference against heirs, executors, or administrators, in their administration of their ancestors', testators', or intestates' estates." But this enactment did not apply in the case of

(a) *Chadwick v. Holt*, 8 D. M. & G. 584.

(b) *Shaw v. Neale*, 6 H. L. Cas. 581, 599.

(c) *Pratt v. Ball*, 1 D. J. & S. 141; *Bull v. Hutchens*, 32 Beav. 615.

purchasers and mortgagees who had notice of judgments : PART II.  
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for such persons were bound by those judgments, though not docketed (a). 1189.

By the stat. 1 & 2 Vict. c. 110, s. 19, no judgment, decree, rule, or order shall, by virtue of the Act, affect any hereditament as to purchasers, mortgagees, or creditors, unless and until registered :—"No judgment of any of the said superior Courts, nor any decree or order in any Court of Equity, nor any rule of a Court of Common Law, nor any order in bankruptcy or lunacy, shall by virtue of this Act affect any lands, tenements, or hereditaments, as to purchasers, mortgagees, or creditors, unless and until a memorandum or minute, containing the name, and the usual or last known place of abode, and the title, trade, or profession of the person whose estate is intended to be affected thereby, and the Court and the title of the cause or matter in which such judgment, decree, order, or rule shall have been obtained or made, and the date of such judgment, decree, order, or rule, and the amount of the debt, damages, costs, or moneys thereby recovered or ordered to be paid, shall be left with the senior Master of the Court of Common Pleas, who shall forthwith enter the same particulars in a book in alphabetical order, by the name of the person whose estate is intended to be affected." And by the stat. 2 Vict. c. 11, s. 3, the Master shall insert in such book the year and the day of the month when every such memorandum or minute is so left with him. 1190.

Under the 19th section of the stat. 1 & 2 Vict. c. 110, a judgment has no retrospective operation as against purchasers, mortgagees, or creditors, after it has been registered (b). 1191.

We have seen that by the stat. 23 & 24 Vict. c. 38, s. 1,

(a) Coote Mortg., 3rd ed. 48.

(b) *Hargrave v. Hargrave*, 23 Beav. 484.

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in order to bind purchasers or mortgagees, the process of execution of the judgment, etc., must have been registered before the conveyance or mortgage (a). And by s. 2, "the registry hereinbefore required of any writ of execution, or other due process on any judgment, statute, or recognisance, in order to bind a purchaser or mortgagee, shall be made by a memorandum or minute referring to the judgment, statute, or recognisance already registered, so as to connect the registry of the writ of execution or other process therewith; such memorandum or minute to be left with the senior Master of the Court of Common Pleas at Westminster, who shall forthwith enter the particulars in a book in alphabetical order by the name of the person in whose behalf the judgment, statute, or recognisance upon which the writ of execution or other process issued was registered, and also the year and the day of the month when every such memorandum or minute is left with him." 1192.

By the stat. 2 Vict. c. 11, s. 1, the dockets of judgments under the stat. 4 & 5 W. & M. c. 20, are closed. And by stat. 2 Vict. c. 11, s. 2, "no judgment already docketed under that Act shall, after 1st August, 1841, affect any hereditaments, as to purchasers, mortgagees, or creditors, unless and until such memorandum as is prescribed by the stat. 1 & 2 Vict. c. 110, shall be left with the senior Master of the Court of Common Pleas" to be entered by him. 1193.

The stat. 2 Vict. c. 11, by abolishing dockets, virtually repealed the enactment of the stat. 4 & 5 W. & M. c. 20, that "no judgment not docketed shall have any preference against heirs, executors, or administrators," in the administration of assets. So that it was held that judgment debts, although they cannot now be docketed, shall have the preference they used to have before the stat. 4 & 5 W.

(a) See *supra*, par. 1167.

& M. c. 20, and must be paid before simple contract debts (a). But by the stat. 23 & 24 Vict. c. 38, s. 3, it is enacted as follows: "Whereas by an Act passed in the fourth and fifth years of their late majesties King William and Queen Mary, intituled 'An Act for the better Discovery of Judgments in the Courts of King's Bench, Common Pleas, and Exchequer in Westminster,' it was enacted, that no judgment not docketed and entered in books in the manner thereby provided should affect any lands or tenements as to purchasers or mortgagees, or have any preference against heirs, executors, or administrators, in their administration of their ancestors', testators', or intestates' estates: And whereas by several later Acts judgments are required to be registered with more particulars than were required by the said recited Act; and it is thereby enacted that judgments not so registered shall not affect any lands, tenements, or hereditaments as to purchasers, mortgagees, or creditors, unless and until the same shall be registered in manner thereby required; and, in obedience to a direction in one of the same Acts contained, the dockets existing under the said first-recited Act have been finally closed: And whereas the said several later Acts do not expressly enact that judgments not docketed as thereby required shall not have any preference against heirs, executors, or administrators, in their administration of their ancestors', testators', or intestates' estates, in consequence whereof such heirs, executors, or administrators have been held to have lost the protection which they enjoyed under the said first-recited Act, and it is expedient that the same should be restored: Be it therefore declared and enacted, That no judgment which has not already been or which shall not hereafter be entered or docketed under the several Acts now in force, and which passed subsequently to the said Act of the fourth and fifth

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(a) *Fuller v. Redman* (No. 1), 26 Beav. 600.

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years of King William and Queen Mary, so as to bind lands, tenements, or hereditaments, as against purchasers, mortgagees, or creditors, shall have any preference against heirs, executors, or administrators, in their administration of their ancestors', testators', or intestates' estates" (a). 1194.

Re-registra-  
tion of  
judgments,  
decrees,  
orders, and  
rules, as  
against  
purchasers,  
mortgagees,  
or creditors.

By the stat. 2 Vict. c. 11, s. 4, judgments, decrees, orders, and rules, after five years from the date of the first registration thereof, shall be void against hereditaments, as to purchasers, mortgagees, and creditors, unless again registered within five years before the instrument under which such purchasers and mortgagees claim, or before the rights of such creditors accrued, and so, toties quoties, at the expiration of every succeeding five years: "All judgments of any of the superior Courts, decrees or orders in any Court of Equity, rules of a Court of Common Law, and orders in bankruptcy or lunacy, which since the passing of the said recited Act of the first and second years of the reign of her present Majesty have been registered under the provisions therein contained, or which shall hereafter be so registered, shall after the expiration of five years from the date of the entry thereof, be null and void against lands, tenements, and other hereditaments, as to purchasers, mortgagees, or creditors, unless a like memorandum or minute as was required in the first instance is again left with the senior Master of the said Court of Common Pleas within five years before the execution of the conveyance, settlement, mortgage, lease, or other deed or instrument vesting or transferring the legal or equitable right, title, estate, or interest in or to any such purchaser or mortgagee for valuable consideration, or, as to creditors, within five years before the right of such creditors accrued, and so, toties quoties, at the expiration of every succeeding

(a) See *Jennings v. Rigby*, 33 Beav. 198; *Kemp v. Waddingham*, L. R. 1 Q. B. 356.



five years ; and the senior Master shall forthwith re-enter the same in like manner as the same was originally entered." **1195.**

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This enactment that the judgment shall be void against lands "as to creditors" unless re-registered within five years before the right of such creditors accrued, refers only to creditors who have acquired a right or interest in the land ; and the accruer of the right to such creditors means an accruer of the right to the land, so as to enable them to dispute the right of the judgment creditor in respect thereof : so that the section does not refer to creditors who have not acquired any specific right or interest in the land (a). **1196.**

By the stat. 18 Vict. c. 15, s. 6, "it shall be deemed sufficient to bind such purchasers, mortgagees, and creditors, if such memorandum or minute as was required in the first instance is again left with the senior Master of the Common Pleas within five years before the execution of the conveyance, settlement, mortgage, lease, or other deed or instrument vesting or transferring the legal or equitable right, title, estate, or interest, in or to any such purchaser or mortgagee, for valuable consideration, or, as to creditors, within five years before the right of such creditors accrued, as directed by the said last-mentioned Act (the stat. 2 Vict. c. 11), although more than five years shall have expired by effluxion of time since the last previous registration before such last-mentioned memorandum or minute was left, and so, toties quoties, upon every re-registry." **1197.**

Registration will protect the judgment creditor against all who become interested as mortgagees, purchasers, or creditors, during the currency of the five years following such registration. And such protection against *them* will

(a) *Simpson v. Morley*, 2 K. & J. 71.

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continue though the judgment be not re-registered until some time after the expiration of the five years, or not re-registered at all; because the object of the statute being to afford all persons advancing money the means of knowing, by a search of the register for not more than five years before, whether there are any prior charges or not, it could not have been the intention of the legislature that a purchaser or mortgagee, once having the means of knowing, by the registration effected previous to his purchase or mortgage of the existence of a prior charge, should be bettered, as to his security, by the subsequent omission of that which, as to him, was a mere formal act, namely, the re-registration. But as to persons becoming entitled as purchasers, mortgagees, or creditors, in the interval between the expiration of the five years following the first registration of the judgment, and the time of registration thereof, the judgment creditor will not be protected, but they will have priority over him, because the object of the Act was not merely to give purchasers, mortgagees, or creditors, the means of ascertaining the existence of prior judgments, but also to prevent the necessity of their searching for more than five years previously, in order to ascertain the existence of prior judgments; by enacting that judgments not re-registered within five years before the title of such purchasers, mortgagees, or creditors, should not affect them. When the stat. 2 Vict. c. 11, s. 4, says that judgments, etc., shall, after the expiration of five years from registration, be void "as to purchasers, mortgagees, or creditors," unless re-registered "within five years *before* the execution" of the instrument under which such purchasers or mortgagees claim, or within five years *before* the accruer of right to such creditors; the words "*before* the execution," etc., show that the "purchasers, mortgagees, or creditors" are those who become interested as such after the expiration

of the five years following the first or prior registration (a). 1198.

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By the stat. 23 & 24 Vict. c. 38, s. 4, it is enacted that "no judgments which, since the passing of the Act 1 & 2 Vict. c. 110, have been registered under the provisions therein contained, or contained in the Act of the 2 & 3 Vict. c. 11, as explained and amended by the Act of the 18 & 19 Vict. c. 15, or which will hereafter be so registered, shall have any preference against heirs, executors, or administrators, in their administration of their executors', testators', or intestates' estates, unless at the death of the testator or intestate five years shall not have elapsed from the date of the entry thereof on the docket or from the only or last re-registry thereof, as the case may be, which re-registry from time to time is hereby authorised to be made in manner directed by the said Act of the second and third of Queen Victoria, as explained and amended by the Act of the eighteenth and nineteenth of Queen Victoria; but it shall be deemed sufficient to secure such preference as aforesaid, if such a memorandum as was required in the first instance is again left with the senior Master of the Common Pleas within five years before the death of the testator or intestate, although more than five years shall have expired by effluxion of time since the last previous registration, before such last-mentioned memorandum or minute was left; and so toties quoties upon every re-registry" (b). 1199.

Re-registra-  
tion as  
against  
heirs and  
executors.

By the stat. 23 & 24 Vict. c. 38, s. 5, "In the construction of the previous provisions, the term judgment shall be taken to include registered decrees, orders of Courts of Equity and Bankruptcy, and other orders having the operation of a judgment." 1200.

(a) *Beavan v. Earl of Oxford*, 6 D. M. & G. 492; *Shaw v. Neale*, 6 H. L. Cas. 581, 595, 605, 606, 614;

Sugl. V. & P., 13th ed. 425, 426.

(b) See *Evans v. Williams*, 2 Dr. & Sm. 324.

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Writs of  
execution to  
be regis-  
tered in  
manner  
prescribed  
by 23 & 24  
Vict. c. 38.

By the stat. 27 & 28 Vict. c. 112, s. 3, "Every writ or other process of execution of any such judgment, statute, or recognisance, by virtue whereof any land shall have been actually delivered in execution, shall be registered in the manner provided by an Act passed in the session of the twenty-third and twenty-fourth years of her present Majesty, intituled 'An Act to further amend the Law of Property,' but in the name of the debtor against whom such writ or process is issued, instead of, as under the said Act, in the name of the creditor; and no other or prior registration of such judgment, statute, or recognisance shall be or be deemed necessary for any purpose; and no reference to any such prior registration shall be required to be made in or by the memorandum or minute of such writ or other process of execution which shall be left with the senior Master of the Court of Common Pleas for the purpose of such registry." 1201.

Enactment  
as to notice.

By the stat. 2 Vict. c. 11, s. 5, purchasers and mortgagees, *without* notice, are not to be affected by such registered judgments, decrees, rules, or orders, more extensively than by docketed judgments before the stat. 1 & 2 Vict. c. 110: "As against purchasers and mortgagees, without notice of such judgments, decrees or orders, rules or orders, as aforesaid, none of such judgments, decrees, or orders, rules or orders, shall bind or affect any lands, tenements, or hereditaments, or any interest therein, further or otherwise or more extensively in any respect, although duly registered, than a judgment of one of the superior Courts aforesaid would have bound such purchaser or mortgagee before the said Act of the first and second years of the reign of her present Majesty, where it had been duly docketed according to the law then in force." 1202.

By the stat. 3 & 4 Vict. c. 82, s. 2, which appears to have been framed in ignorance of the existence of the stat. 2 Vict.

c. 11 (a), no unregistered judgment, decree, order, or rule, shall by virtue of the stat. 1 & 2 Vict. c. 110, affect purchasers, mortgagees, or creditors, notwithstanding any notice thereof: "No such judgment, decree, order, or rule as aforesaid shall, by virtue of the said Act, affect any lands, tenements, or hereditaments, at law or in equity, as to purchasers, mortgagees, or creditors, unless and until such a memorandum or minute as in the said Act in that behalf mentioned shall have been left with the senior Master of the said Court of Common Pleas at Westminster; any notice of any such judgment, decree, order, or rule, to any such purchaser, mortgagee, or creditor, in anywise notwithstanding." **1203.**

In consequence of the insertion of the words "by virtue of the said Act," it was questioned whether this enactment applied to the case of a creditor proceeding upon an old docketed judgment not duly registered, or upon a judgment neither docketed nor registered, of which such creditor had notice (b). And therefore by the stat. 18 Vict. c. 15, s. 4, this provision negating the effect of notice is extended to all unregistered judgments, decrees, orders, and rules, though operating otherwise than by virtue of the stat. 1 & 2 Vict. c. 110, whether docketed or not:—"Whereas the protection afforded to purchasers, mortgagees, and creditors, by the said Act of the third and fourth of Her Majesty, against judgments, decrees, orders, or rules, not duly registered, any notice thereof notwithstanding, is confined to judgments, decrees, orders, or rules binding by virtue of the said Act of the first and second years of Her Majesty: And whereas the docket or register previously in use has been closed and the said provision ought not to be so restricted: Be it therefore enacted, That no judgment, decree, order, or rule which might be registered under the said Act of the first

(a) Coote Mortg., 3rd ed. 55.

Sugd. V. & P., 13th ed. 428; Prid.

(b) Coote Mortg., 3rd ed. 55;

on Judgm., 4th ed. 107--8.

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and second years of Her Majesty shall affect any hereditaments, at law or in equity, as to purchasers, mortgagees, or creditors, unless and until such a memorandum or minute as in the said Act in that behalf mentioned shall have been left with the proper officer of the proper Court, any notice of any such judgment, decree, order, or rule, to any such purchaser, mortgagee, or creditor, in anywise notwithstanding." 1204.

By the stat. 18 Vict. c. 15, s. 5, this provision negating the effect of notice is extended to judgments, decrees, orders, and rules not re-registered:—"The provision contained in the section numbered 2 of the said Act of the third and fourth years of Her Majesty extends and shall be deemed to extend as well to the Act therein referred to as the section numbered 4 of the said Act of the second and third of Her Majesty, as explained by this Act, so that notice of any judgment, decree, order, or rule, not duly re-registered, shall not avail against purchasers, mortgagees, or creditors, as to lands, tenements, or hereditaments." 1205.

Lites  
pendentes.

By the stat. 2 Vict. c. 11, s. 7, no *lis pendens* shall bind a purchaser or mortgagee, without express notice thereof, unless and until registered and re-registered, in the same way as a judgment:—"No *lis pendens* shall bind a purchaser or mortgagee without express notice thereof, unless and until a memorandum or minute, containing the name and the usual or last known place of abode, and the title, trade, or profession of the person whose estate is intended to be affected thereby, and the Court of Equity, and the title of the cause or information, and the day when the bill or information was filed, shall be left with the senior Master of the said Court of Common Pleas, who shall forthwith enter the same particulars in a book as aforesaid, in alphabetical order, by the name of the person whose estate is intended to be affected by such *lis pendens*; and

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such officer shall be entitled for any such entry to the sum of two shillings and sixpence ; and the provisions hereinbefore contained in regard to the re-entering of judgments every five years, and the fee payable to the officer thereon, shall extend to every case of *lis pendens* which shall be registered under the provisions of this Act." And by the stat. 13 & 14 Vict. c. 35, s. 17, "the filing of a special case and the entering of appearances thereto by the persons named as defendants therein, shall be taken to be a *lis pendens*, and may be registered under the provisions of an Act made and passed in the second year of the reign of her present Majesty, intituled, 'An Act for the better protection of purchasers against judgments, crown debts, *lis pendens*, and fiats in bankruptcy,' in like manner as any other *lis pendens* in a Court of Equity may now be so registered, and, unless and until so registered, shall not bind a purchaser or mortgagee without express notice thereof." 1206.

A registered *lis pendens* does not create a charge or lien on the property. The effect of the registration of a *lis pendens* is, simply to render it incumbent on persons to inquire into the claim of the plaintiff who registers it (a). 1207.

Court may order the vacating of registration of *lis pendens*, etc.

By the stat. 30 & 31 Vict. c. 47, after reciting that "a registered *lis pendens* cannot be vacated without the consent of the person by whom it was registered, and such consent is sometimes withheld, although the suit or proceeding is at an end, or is not being *bonâ fide* prosecuted : for remedy whereof it is enacted, that the Court before whom the property sought to be bound is in litigation may, upon the determination of the *lis pendens*, or during the pendency thereof, where the Court shall be satisfied that the litigation is not prosecuted *bonâ fide*, make an order, if

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it shall see fit, for the vacating of the registration without the consent of the party who registered it, and may, in the discretion of the Court, direct the party on whose behalf the registration was made to pay all the costs and expenses occasioned by the registration or the vacating thereof." 1208.

Judgments,  
etc., in  
Palatinate  
Courts.

By the stat. 1 & 2 Vict. c. 110, s. 21, and by the stat. 18 Vict. c. 15, ss. 1, 2, & 3, and by the stat. 23 & 24 Vict. c. 38, s. 2, certain provisions are made for extending the law relating to judgments, decrees, orders, and rules of, and lites pendentes in, the superior Courts, under the statutes before mentioned, to similar proceedings of and in the Palatinate Courts of Lancaster and Durham. 1209.

Judgments,  
etc., of  
inferior  
Courts may  
be removed  
into superior  
Courts.

By the stat. 1 & 2 Vict. c. 110, s. 22, it is in effect enacted, that judgments, rules, or orders of inferior Courts of Record, in which a barrister of not less than seven years' standing shall act as a judge, assessor, or assistant, may be removed into the superior Courts or into the Court of Common Pleas at Lancaster, and shall then have the effect of a judgment, rule, or order of such superior Court. And by the stat. 18 Vict. c. 15, s. 7 (which repeals a provision in the 22nd section of the stat. 1 & 2 Vict. c. 110, as to purchasers, mortgagees, and creditors), it is in effect enacted, that no judgment, rule, or order removed, shall bind purchasers, mortgagees, or creditors, unless and until registered and re-registered, like judgments of the superior Courts. 1210.

Registration  
thereof.

Registration  
of orders of  
Court of  
Bankruptcy  
under ss. 123  
and 249  
of Bankrupt  
Act.

By the stat. 18 Vict. c. 15, s. 10, no order of the Court of Bankruptcy for payment of money or of costs under sections 123 and 249 of the Bankrupt Law Consolidation Act, 1849, "shall affect any hereditaments as to purchasers, mortgagees, or creditors, unless and until it shall be registered, and if necessary, re-registered, in like manner as, in order to bind such purchasers, mortgagees, or creditors, it must have been, if it had originally been a judgment or



rule obtained or entered up in one of the superior Courts or in the said Palatinate Court respectively, any notice of any such order to any such purchaser, mortgagee, or creditor in anywise notwithstanding." **1211.**

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By the stat. 5 Anne, c. 18, s. 14, as to hereditaments in the West Riding of the county of York; by the stat. 6 Anne, c. 35, s. 19, as to hereditaments in the East Riding and in the town and county of the town of Kingston-upon-Hull; and by the stat. 7 Anne, c. 20, s. 18, as to hereditaments in Middlesex, no judgment, statute, or recognisance, except on account of the Crown, shall affect or bind any hereditaments but from the time that a memorandum thereof shall be entered in the registry office there. But by s. 11 of the first Act, and s. 28 of the second, if they are registered within thirty days after the acknowledgment or signing thereof, the lands in the West and East Ridings and in Kingston-upon-Hull, which the defendants or cognizors had at the time of such acknowledgment or signing shall be bound thereby. **1212.**

Registration  
of judg-  
ments,  
statutes,  
and recog-  
nissances in  
Yorkshire  
and Middle-  
sex.

By the stat. 8 Geo. 2, c. 6, s. 1, as to hereditaments in the North Riding, every judgment, statute, and recognisance shall be void, against subsequent purchasers or mortgagees, plaintiffs or cognizees for or upon valuable consideration, unless registered before the registry of the memorial of the deed of conveyance, judgment, statute, or recognisance under which they claim. But by s. 33, if such judgments, statutes, or recognisances are registered within twenty days after the acknowledgment or signing thereof, all the lands that the defendant or cognizor had at the time of such acknowledgment or signing shall be bound thereby. **1213.**

The recent statutes on registration do not repeal the local registry Acts; nor do they contain an exception of the register counties; and therefore, in the case of lands

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situate there, both kinds of registration are necessary (a). Of course, this is a *casus omissus* on the part of the legislature. And it operates as a legal trap to many a practitioner, which it is extremely important to bear in mind. 1214.

In the case of judgments entered up before the 23rd of July, 1860, a subsequent judgment registered in the Middlesex registry before an earlier judgment has priority over such earlier judgment, notwithstanding the subsequent judgment creditor, at the time when his judgment was entered up, had notice of the earlier judgment (b). 1215.

When a prior judgment is registered in Yorkshire before a subsequent one, the first has a priority over the second, though the second be first registered in the Common Pleas (c). 1216.

Docketing of a judgment under the old law was not notice of it; nor is registration of it notice under the new law (d). 1217.

We have seen that, by the old law, a purchaser or mortgagee was bound by judgments of which he had notice, whether docketed or not (e). Now, however (as regards judgments entered up before the 23rd of July, 1860), in consequence of the stat. 3 & 4 Vict. c. 82, s. 2, extended by the stat. 18 Vict. c. 15, s. 4, he is not bound even by judgments of which he had notice, unless they are registered (f). And in consequence of the stat. 2 Vict. c. 11, s. 5, as far

General  
remarks on  
the effect of  
judgments  
entered up  
at different  
times.

(a) Prid. on Judgm., 4th ed. 109; Coote Mortg., 3rd ed. 79; Shelf. Real Prop. Acts, 6th ed. 542, 557; Sugd. V. & P., 13th ed. 431; *Westbrook v. Blythe*, 3 Ell. & Bl. 737; *Benham v. Keane*, 1 Johns. & Hem. 685; 3 D. F. & J. 318.

(b) *Benham v. Keane*, 1 Johns. & Hem. 685; 3 D. F. & J. 318.

(c) *Nere v. Flood*, 33 Beav. 666.

(d) Sugd. V. & P., 13th ed. 427; Fisher Mortg. 335.

(e) Coote Mortg. 3rd ed. 48; Prid. Judgm., 4th ed. 104; Fisher Mortg. 335.

(f) Sugd. V. & P., 13th ed. 423, 428; Fisher Mortg. 335. See *supra*, par. 1203, 1204.

as regards the extended remedies of the stat. 1 & 2 Vict. c. 110, he is not bound by judgments of which he had no notice, though they are registered (*a*). But he is bound by registered judgments of which he had no notice, to the same extent as he would have been by docketed judgments before that statute (*b*). **1218.**

The result, therefore, as regards judgments entered up before the 23rd of July, 1860, is, that in order to subject purchasers and mortgagees to the extended remedies of the stat. 1 & 2 Vict. c. 110, both notice and registration are necessary: registration is necessary by that statute itself, and notice is necessary by the stat. 2 Vict. c. 11, s. 5. But in order to subject them merely to the old remedies prior to the stat. 1 & 2 Vict. c. 110, registration will suffice without notice; although, in consequence of the stat. 18 Vict. c. 15, s. 4, notice will not suffice without registration. **1219.**

It follows from this that the proper course is, in all cases to search for judgments. Some practitioners imagine that if they do not search, and neither they nor their clients have any notice aliunde, their clients will be safe. But this is a mistake. It is true that they will not be liable to the *extended* remedies of the stat. 1 & 2 Vict. c. 110; but they will be subjected to the *old* remedies prior to that statute, although the register be not searched, and no notice be had of any judgments from any other source. [And now stat. 45 & 46 Vict. c. 39, s. 2 (Appendix), makes provisions facilitating the searching for judgments.] **1220.**

A subsequent incumbrancer might obtain priority by registering even after notice, if he had no notice when he took his security (*c*). **1221.**

As regards judgments entered up after the 23rd of July,

(*a*) Prid. Judgm., 4th ed. 58. See Fisher Mortg. 40.  
supra, par. 1202.

(*b*) Prid. Judgm., 4th ed. 58;

(*c*) Fisher Mortg. 420—423.

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1860, a purchaser or mortgagee, in consequence of the stat. 23 & 24 Vict. c. 38, s. 1, is not bound by them, unless process of execution shall have been issued and registered before the conveyance or mortgage; nor unless such execution shall be put in force within three calendar months from the registration. 1222.

And in consequence of the stat. 27 & 28 Vict. c. 112, ss. 1, 2, judgments, and decrees, and orders having the same effect, entered up after the 29th of July, 1864, will not affect land, until such land has been actually delivered in execution in pursuance thereof (a). 1223.

Execution  
of a writ of  
fieri facias or  
elegit.

Except so far as the stat. 27 & 28 Vict. c. 112, ss. 4—6 (b), may affect the case, if there are several writs of fieri facias in the sheriff's possession at the same time, he must in ordinary cases apply the proceeds of sale according to their priority in point of delivery to him; so that it may happen that the debt in respect of which the writ was first lodged with him may absorb the whole proceeds. But if execution of a prior writ is suspended by the creditor or would-be fraudulent, he must apply the proceeds in discharge of the next (c). If any surplus remains, it is to be paid over to the debtor (d). The sale should be at a proper price, either by public auction or by private contract, and either to the creditor or to a stranger. But the property cannot be delivered to the plaintiff in satisfaction of his debt, as under an elegit, but it may be sold to him at its real value (e). And a bona fide purchaser has an indefeasible title by a purchase under a fieri facias, unless the writ was void, or unless the property did not belong to

(a) See *supra*, par. 1168, 1169;  
*Guest v. Cambridge Railway Com-*  
*pany*, L. R. 6 Eq. 619.

(b) See *infra*, par. 1228—1230.

(c) Archb. 9th ed. by Prentice,  
618, 619; Atkinson's *Sheriff's Law*,  
179, 180.

(d) Archb. 9th ed. by Prentice,  
594.

(e) Archb. 9th ed. by Prentice,  
594; Atkinson's *Sheriff's Law*, 182;  
Tomlin's *Law Dict.* 4th ed. by  
Granger, tit. "Elegit."

the debtor. If the judgment is reversed, the money arising from the sale must be restored, and not the term or the goods sold (*a*). But where property is delivered under an elegit, if the judgment is reversed, the property must be restored in specie (*b*). **1224.**

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If the creditor first sues out a writ of fieri facias against the debtor's goods, and they are insufficient to satisfy the debt, he may take out an elegit against his lands for the remainder of the debt. And this is the best course (*c*). **1225.**

Elegit after  
a fieri facias.

Under an elegit, the creditor might and still may either extend a term for years, that is, he might by the old law have a moiety of the term, and he may by the stat. 1 & 2 Vict. c. 110, have the whole of it delivered to him at an annual value as part of the lands of the debtor, or else he might and still may have the whole term delivered to him as part of the debtor's chattels at a sum appraised by a jury (*d*). **1226.**

Execution of  
a term.

The delivery of a term under an elegit or the sale of a term under a fieri facias does not give the actual possession, but only a right to the possession, which may be enforced by entry or ejectment (*e*). And a written assignment by the sheriff under his official seal is necessary to pass the legal estate in the term sold under a writ of fieri facias (*f*). **1227.**

By the stat. 27 & 28 Vict. c. 112, "Every creditor to whom any land of his debtor shall have been actually

Creditor to  
whom land  
delivered in  
execution

(*a*) Archb. 9th ed. by Prentice, 589, 595; Atkinson's Sheriff's Law, 184; 2 Saund. Rep. 6th ed. by Wms. 69.

(*b*) 2 Saund. Rep. 6th ed. by Wms. 69; Tomlin's Law Dict. 4th ed. by Granger, tit. "Fieri facias."

(*c*) 2 Saund. Rep. 6th ed. by Wms. 69; Archb. 9th ed. by Prentice, 625, 635.

(*d*) Archb. 9th ed. by Prentice, 633—4; 2 Saund. Rep. 6th ed. by Wms. 68 g; Prid. Judgm., 4th ed. 8.

(*e*) Atkinson's Sheriff's Law, 183—4, 198—9; Archb. 9th ed. by Prentice, 602, 635; 2 Saund. Rep. 6th ed. by Wms. 69 f.

(*f*) Archb. 9th ed. by Prentice, 601—2; Atkinson's Sheriff's Law, 184.

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entitled to  
obtain  
summary  
order from  
Court of  
Chancery  
for sale.

delivered in execution by virtue of any such judgment, statute, or recognisance, and whose writ or other process of execution shall be duly registered, shall be entitled forthwith, or at any time afterwards, while the registry of such writ or process shall continue in force, to obtain from the Court of Chancery, upon petition, in a summary way, an order for the sale of his debtor's interest in such land, and every such petition may be served upon the debtor only; and thereupon the Court shall direct all such inquiries to be made as to the nature and particulars of the debtor's interest in such land, and his title thereto, as shall appear to be necessary or proper; and in making such inquiries, and generally in carrying into effect such order for sale, the practice of the said Court with respect to sales of real estates of deceased persons for the payment of debts shall be adopted and followed, so far as the same may be found conveniently applicable" (s. 4). 1228.

Where there  
are other  
creditors,  
notice of  
sale to be  
served upon  
them.

"If it shall appear on making such inquiries that any other debt due on any judgment, statute, or recognisance is a charge on such land, the creditor entitled to the benefit of such charge (whether prior or subsequent to the charge of the petitioner) shall be served with notice of the said order for sale, and shall after such service be bound thereby, and shall be at liberty to attend the proceedings under the same, and to have the benefit thereof; and the proceeds of such sale shall be distributed among the persons who may be found entitled thereto, according to their respective priorities" (s. 5). 1229.

Parties  
claiming  
interest  
through  
debtor  
bound by  
order for  
sale.

"Every person claiming any interest in such land through or under the debtor, by any means subsequent to the delivery of such land in execution as aforesaid, shall be bound by every such order for sale, and by all the proceedings consequent thereon" (s. 6). 1230.

Extinction  
of estate by  
statute, re-

It appears that an estate by statute, recognisance, or elegit may be extinguished by any act (as a deed of defea-

sance or of release) which extinguishes the debt (a). But if a creditor by judgment or statute releases to his debtor before execution, all his right, interest, or demand in the lands generally, or any particular lands of the debtor, he may notwithstanding afterwards sue out execution against the lands; for the creditor had no estate or specific interest in, or specific lien upon the land, at the time of the release. But a release after execution levied would discharge the land: and in such case, prior to the stat. 22 & 23 Vict. c. 35, a release of part of the land extended operated as a release of the whole; for it was a discharge not merely of the land expressed to be released, but of the execution (b). This would seem to depend upon a metaphysical principle that the creditor's right was so entire and connected with every part of the land, that if any portion of the estate which was subject to it was released from it, the whole became extinct; like the case of a release by the owner of a rent charge, of part of the estate which was subject to that charge; or a release by the owner of a right of common, of a part of the estate in which a common right exists. And it is one of those legal traps into which the practitioner is peculiarly liable to fall. Mr. Jarman remarks that this doctrine often comes under consideration in practice, when it happens that a judgment creditor is willing to discharge particular lands about to be conveyed to a purchaser or mortgagee, provided he could do so without prejudice to his claim on the rest of his debtor's property; objects which the doctrine in question showed to be incompatible (b). 1231.

In favour of a purchaser for valuable consideration or a mortgagee, probably a Court of Equity would restrain a creditor releasing before execution from afterwards enforcing his legal right. 1232.

(a) Burton, § 925.

(b) 9 Jarm. & Byth. 3rd ed. 815; 2 Pres. Shep. T. 322, 329.

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The doctrine in question as to the effect, at law, of a release by a judgment creditor *before* execution, would seem not to be altered by the new law under the stat. 1 & 2 Vict. c. 110, s. 13. For although under that enactment a judgment creditor has an actual interest in the land before execution, yet it is only an equitable interest, and the release of such equitable interest could not affect the creditor's potential legal right of suing out execution, except so far as it might bring him within the restraining power of a Court of Equity. Nor does the doctrine as to the effect at law of a release by a judgment creditor *after* execution appear to be altered by that enactment. Admitting that, so far as concerns the creditor's equitable interest under that enactment, the creditor might release part of the land from such interest without releasing the rest, yet so far as regards the legal right, it would seem that a release of part of the land still operated as a release of the whole. **1233.**

Release of  
part of land  
charged not  
to affect  
judgment.

By the stat. 22 & 23 Vict. c. 35, s. 11, it is, however, enacted, that "the release from a judgment of part of any hereditaments charged therewith shall not affect the validity of the judgment as to the hereditaments remaining unreleased, or as to any other property not specifically released, without prejudice nevertheless to the rights of all persons interested in the hereditaments or property remaining unreleased, and not concurring in or confirming the release." **1234.**

Satisfaction  
or discharge  
of judgments,  
pending  
suits, de-  
crees,  
orders,  
rules, etc.

By the stat. 23 & 24 Vict. c. 115, s. 2, the senior Master of the Court of Common Pleas "may, upon the filing of an acknowledgment" of satisfaction, "enter a satisfaction or discharge as to any registered judgment, pending suit, lis pendens, decree, order, rule, annuity, or rent charge, or writ of execution," "and may issue certificates of the entry of any satisfaction or discharge." **1235.**

Extension

By the stat. 31 & 32 Vict. c. 54, enactments are made



“ to render judgments or decreets obtained in certain Courts in England, Scotland, and Ireland respectively effectual in any other part of the United Kingdom.” [And the principle of this Act is extended by stat. 45 & 46 Vict. c. 31, being “ An Act to render judgments obtained in certain inferior Courts in England, Scotland, and Ireland respectively, effectual in any other part of the United Kingdom.”

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of effect  
of judgment  
to other  
parts of the  
United  
Kingdom.

Under the provisions of the last-mentioned Act, when a judgment has, after the date of that Act, been obtained, or entered up in any of the inferior Courts (a) of England, Scotland, or Ireland respectively, the Registrar, or other proper officer of the inferior Court is bound, on an application according to the provisions of the Act, to grant a certificate of the judgment. And the registration of the certificate has the effect of a judgment of any inferior Court in which it is registered; and process of execution may issue thereon, out of such Court accordingly. But no certificate of a judgment can be registered more than twelve months after the date of the judgment. And provision is made for the cancellation of the registry when necessary.] 1236.

(a) The expression “ inferior Courts ” is interpreted by the Act to include County Courts, Civil Bill Courts, and all Courts in England and Ireland having jurisdiction to hear and determine civil causes, other than the High Courts

of Justice; and in Ireland, Courts of Petty Sessions and the Court of Bankruptcy; and in Scotland the Sheriffs’ Courts and the Courts held under the Small Debts and Debts Recovery Acts.

## CHAPTER IV.

## OF CHARGES ON BENEFICES.

PART II.  
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Charges by  
a canon or  
prebend.

WHERE a manor or rectory is specifically allotted to a prebend, the prebendary has power to charge it. So, the lands and emoluments attached to a canonry (which is an ecclesiastical office without cure), can, it seems, form the subject of a charge or mortgage; but the canonry itself as an ecclesiastical office, or even the prebend, since the 13 & 14 Car. 2, c. 4 (with two exceptions), cannot, it seems, be the subject of a grant (*a*). 1237.

Stat. 13 Eliz.  
c. 20, and  
subsequent  
Acts.

The stat. 13 Eliz. c. 20, enacts, that all chargings of benefices, with cure of souls, with any pension, or with any profit, out of the same to be yielded or taken, other than rents or leases according to the Act, shall be utterly void. And by the stat. 3 Car. 1, c. 4, s. 2, this Act was made perpetual (*b*). 1238.

These statutes were repealed by the stat. 43 Geo. 3, c. 84, s. 10, passed in the year 1803. But as the stat. 57 Geo. 3, c. 99, s. 1, passed in the year 1817, repealed the stat. 43 Geo. 3, c. 84, and does not repeal the stat. 13 Eliz. c. 20, in regard to charges on benefices, the stat. 13 Eliz. c. 20 is revived (*c*). 1239.

In consequence of these changes in the law, charges on benefices with cure of souls were valid, if created in the interval between the passing of the stat. 43 Geo. 3, c. 84, in 1803, and the passing of the stat. 57 Geo. 3, c. 99, in 1817: but they are void, where they have been created since that time (*d*). 1240. Hence—

(*a*) Coote Mortg., 3rd ed. 206.

(*b*) Id. 202.

(*c*) Id. 203.

(*d*) Id. 204.

I. As to charges created before the passing of 57 Geo. 3, c. 99 :—1. Terms created in benefices, for the purposes of charging the same, in the interval above mentioned, are good (a). 2. And if the terms so created, and the charges thereby made, are assigned now, the assignment will be good, notwithstanding the passing of the stat. 57 Geo. 3, c. 99 (b). 3. And even if a term so created is now assigned for the purpose of securing a fresh charge in favour of a person paying off the original charge, such assignment will be good (c). 1241.

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I. Charges  
before 57  
Geo. 3, c. 99.

II. As to charges created since the 57 Geo. 3, c. 99 :—1. An instrument is void when it appears to have been intended to create, and it does create a charge upon a benefice with cure of souls, if that intention appears from the language of such instrument itself, without looking at any other document (d). Hence, if an incumbent grants an annuity, and gives a warrant of attorney to the grantee, which either itself expressly authorises, or recites words of another instrument which expressly authorises him to issue a sequestration for the purpose of recovering any arrears of the annuity, the warrant is void (e). And if an incumbent demises his benefice to a trustee, in trust for the payment of an annuity in case it should be in arrear, such demise is void (f). And it has been held, that a composition with a clergyman is void, where it is made in consideration that his future income may be received by a trustee, and applied in liquidation of his debts, after providing for a curate, and where it is found that he has

II. Charges  
since the 57  
Geo. 3, c. 99.

(a) *Doe d. Cates v. Somerville*, 5 B. & Cr. 126.

(b) *Doe d. Broughton v. Gully*, 9 B. & Cr. 344.

(c) *Doe d. Wilks v. Ramsden*, 4 B. & Ad. 608.

(d) On this subject see Coote *Mortg.*, 3rd ed. 204; and *Long v.*

*Storie*, 3 De G. & Sm. 308.

(e) See *Flight v. Salter*, 1 B. & Ad. 673; *Newland v. Watkin*, 9 Bing. 113; *Saltmarsh v. Hewett*, 1 Ad. & El. 812; *Skrine v. Hewett*, 1 Ad. & El. 812.

(f) *Shaw v. Pritchard*, 10 B. & Cr. 241.

PART II.  
T. 10, CH. 4.

no other income than the profits of a benefice with cure of souls (a). It is, however, to be observed, that the composition in this case was held to be void, not only on this ground, but also because it was not signed by the clergyman. 1242.

2. But although an instrument may have been clearly intended to create a charge exclusively upon a benefice, and although of its own nature it has the effect of charging such benefice in common with other property, yet it is not void if such intention is only proved by affidavit, or only appears from words of another instrument which are not incorporated into the former instrument by recital or otherwise. And this has been held even though such other instrument be connected with the former by recital or otherwise, and both in fact constitute parts of one and the same transaction (b). Hence it has been held, that, where the warrant of attorney to confess judgment, though it recites a deed granting an annuity and charging it on a living, yet does not contain a reference to a sequestration, it is good; notwithstanding the fact, that "an execution against the living is the common and inevitable consequence of such judgment against a beneficed person" (c). So it has been held, that if the warrant neither recites the annuity deed, nor contains any reference to a sequestration, it is good, even though the deed granting the annuity and charging it on the living recites that the judgment was to be a collateral security for the annuity, and alludes to a sequestration (d). And it has been held, that the warrant is good even if it refers to a bond which recites the annuity deed and an agreement that the pay-

(a) *Alokin v. Hopkins*, 1 Bing. N. C. 99.

(b) But see *Walthew v. Crofts*, 6 Exch. 1.

(c) *Fairoloth v. Gurney*, 9 Bing. 622; *Gibbons v. Hooper*, and *Kirlew*

*v. Butts*, 2 B. & Ad. 734, 736, note; *Aberdeen v. Newland*, 4 Sim. 281;

*Moore v. Ramsden*, 7 Ad. & El. 898

(d) *Britten v. Wait*, 3 B. & Ad. 915.

ment of the annuity should be further secured by a bond and warrant of attorney, with a judgment to be entered up thereon, for the purpose of charging the living, but yet the warrant does not incorporate the objectionable parts of the bond so referred to, or the instrument recited therein, and contains no reference to a sequestration (a).  
**1243.**

PART II.  
T. 10, CH. 4.

Although the judgment, in such cases, be for a gross sum of a large amount, yet the sequestration will be confined to arrears that have become due on the annuity, with liberty to issue a fresh writ of sequestration for any future arrears (b). **1244.**

3. Even where an instrument is void on this account, it is void so far only as it goes to charge the benefice, and is not void in toto, if there are any other ways in which it can operate. Hence a deed granting an annuity and charging it on a benefice, is good as a grant of an annuity, and only void so far as it goes to charge the annuity on the living (c). **1245.**

4. A judgment entered up against a beneficed clergyman is not a charge on his benefice, under the stat. 1 & 2 Vict. c. 110, s. 13 (d). **1246.**

(a) *Colebrook v. Layton*, 4 B. & Ad. 578. 734.

(b) *Britten v. Wait*, 3 B. & Ad. 915; *Kirlow v. Butts*, 2 B. & Ad. 736, note.

(c) *Fairecloth v. Gurney*, 9 Bing. 622; *Gibbons v. Hooper*, 2 B. & Ad.

(d) *Hawkins v. Gathercole*, 6 D. M. & G. 1, and 3 Com. Law & Eq. Rep. 348 (L. J.), overruling the decision of the Court below, 1 Sim. (N. S.) 63; *Bates v. Brothers*, 2 Sm. & Gif. 509. See *supra*, par. 1156.

## PART III.

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### Of the Title to Things constituting the Subjects of Conveyancing.

#### PART III.

Definition  
of a title.

Title by  
descent and  
title by  
purchase.

Different  
senses of  
the word  
"purchase."

**A** TITLE to property is the means by which a person has a right to it. 1247.

The title to land is either by purchase, meaning thereby the act or agreement of the party, or by mere act of law, as by descent or escheat (*a*). But the different modes of acquiring real property have usually been distributed into two general classes—title by descent or hereditary succession, and title by purchase (*b*). 1248.

Purchase, therefore, in this its widest technical sense, is the acquisition of an estate in any other manner than by descent. And hence, if a person takes even by free gift, he is a purchaser in this technical sense of the word. And so a person is called a purchaser in reference to an estate tail which he takes originally under a limitation contained in a settlement made before he was born, and not derivatively by descent from his ancestor (*c*). Sometimes, however, the word purchase signifies an acquisition for valuable consideration. And at other times it signifies an acquisition by act of the party, as opposed to an acquisition by act of law. But in this sense it does not include such a mode of acquisition as escheat (*d*). 1249.

(*a*) Co. Litt. 18 b (3).

(*b*) 2 Bl. Com. 201 ; 3 Cruise T.  
29, c. 1, § 22 ; Co. Litt. 13 b, 18 b.

(*c*) See 2 Bl. Com. 241.

(*d*) Co. Litt. 18 b, and n. (2).

The word purchaser also has various significations. PART III.  
 Sometimes it comprehends every one who has acquired Different senses of the word "purchaser." property otherwise than by descent. At other times it is confined to a person who has acquired property for valuable consideration, whether by sale, mortgage, or otherwise, though such a person is usually styled a purchaser for valuable consideration. And at other times it is used in a still narrower and popular sense, to signify a person who has bought property. 1250.

The different modes of acquiring property according to a Specific kinds of titles. more specific distribution, and so far as they are connected with conveyancing, are these—

- I. Marriage.
- II. Descent, Succession, and Administration.
- III. Escheat.
- IV. Occupancy.
- V. Alluvion and Dereliction.
- VI. Prescription.
- VII. Adverse Possession and the Operation of the Statute of Limitations.
- VIII. Forfeiture.
- IX. Bankruptcy and Insolvency.
- X. Alienation. 1251.

Curtesy and dower arise by marriage; but these we Title by marriage. have already considered. And the law as to the acquisition of personal property by marriage is stated in the chapter on Married Women, in the Fourth Part of this Compendium. 1252.

# TITLE I.

OF DESCENT, SUCCESSION, AND ADMINISTRATION.

## CHAPTER I.

OF DESCENT.

### SECTION I.

#### *Of Descent generally.*

Pr. III. T. 1,  
Ch. 1, s. 1.

Definition of  
descent—

of an heir—

of an inheri-  
tance.

Lineal and  
collateral  
descent.

Consan-  
guinity or  
kindred.

DESCENT or hereditary succession is the title whereby, on the death of the owner of an estate in fee or in tail, without having disposed of it in his lifetime or by his will, it devolves on his heir. An heir, therefore, is he upon whom the law casts the estate immediately on the death of the ancestor; and an estate so descended on the heir is called an inheritance (*a*). 1253.

Lineal descent is the devolution of real estate to an heir who is lineally related to the last deceased owner, whether as an ancestor or as a descendant. Collateral descent is the devolution of real estate to an heir who is only collaterally related to the last deceased owner (*b*). 1254.

The right of hereditary succession depends on the nature and the several degrees of consanguinity or kindred. Consanguinity or kindred is defined to be, *vinculum personarum ab eodem stipite descenditum*, the connection or

(*a*) 2 Bl. Com. 201; 3 Cruise T. 29, c. 2, § 1.

(*b*) As to the word "descendants" meaning collateral descendants, see *Best v. Stonchewer*, 34 Beav. 68; 2

D. J. & S. 537. As to the word "descendants" not being confined to children, see *Ralph v. Carrick*, L. R. 11 Ch. D. (Ap.) 873.



relation of persons descended from the same stock. And it is either lineal or collateral. **1255.**

Fr. III. T. 1,  
Ch. 1, s. 1.

Lineal consanguinity is that connection or relation by blood which subsists between persons who are descended from the same common ancestor in one and the same direct or straight line, so as that each younger one of them is the immediate offspring of the next elder of them ; as in the case of father, grandfather, great-grandfather. **1256.**

Lineal con-  
sanguinity.

Every generation in direct lineal consanguinity constitutes a different degree, reckoning either upwards or downwards. So that the father and son of John Stiles are each related to him in the first degree, and his grandfather and grandson are each related to him in the second degree (*a*). **1257.**

Degrees of  
lineal con-  
sanguinity.

Collateral consanguinity is that connection or relation by blood which subsists between persons, who, although descended from the same common ancestor, are not descended from him in one and the same direct or straight line, but in different lines or collaterally to each other, so that no one of such persons is the offspring or descendant of another of them (*b*). Thus, if John Stiles has two sons, and each of them has a daughter, these two sons are collaterally related to each other, and so are their daughters collaterally related to each other ; and each son is collaterally related to the daughter of the other son. For the sons and daughters are all descended from the same common stock, John Stiles, but in two different lines, so that the sons are not descended from each other ; nor are the daughters ; nor is the daughter of one son descended from the other son. **1258.**

Collateral  
consan-  
guinity.

The method of computing degrees of collateral consanguinity by the canon law, which our law has adopted, is this : we begin at the common ancestor, and reckon down-

Mode of  
computing  
degrees of  
collateral  
consan-

(*a*) 2 Bl. Com. 203 ; Co. Litt. 23 b.

(*b*) 2 Bl. Com. 202—4 ; 3 Cruise T. 29, c. 2, § 5 ; Co. Litt. 24 a.

Pr. III. T. 1.  
Ch. 1, s. 1.

guinity by  
the canon  
and the  
common  
law.

By the civil  
law.

Nemo est  
hæres vi-  
ventis.

Heirs appa-  
rent.

Heirs pre-  
sumptive.

Requisites  
to support a  
claim of  
heirship.

wards, and in whatever degree the two persons are distant from the common ancestor, or the most remote of them is distant from him, that is the degree in which they are related to each other. Thus A. and his brother are related in the first degree ; A. and his nephew are related in the second degree (*a*). Whereas the civilians count upwards, from either of the persons related to the common stock, and then downwards to the other, reckoning a degree for each person, both ascending and descending. So that according to their computation, A. and his brother are related in the second degree ; A. and his nephew in the third degree (*b*). 1259.

No person can be the actual complete heir of another till the death of the latter : *nemo est hæres viventis*. Before that time the person who is next in the line of succession is called an heir apparent or an heir presumptive. Heirs apparent are those whose right of inheritance is indefeasible provided they outlive their ancestor ; as the eldest son or his issue, who must, by the course of the common law be heir to the father, whenever he happens to die. Heirs presumptive are those who, if the ancestor should die immediately, would, under existing circumstances, be his heirs, but whose right of inheritance may be defeated by the contingency of some nearer heir being born. Thus, a brother or a nephew, whose presumptive title may be destroyed by the birth of a child, whether son or daughter, or a daughter whose hope of succession may be destroyed by the birth of a son, is an heir presumptive (*c*). 1260.

Those who would claim as heirs, must be, first, legitimate ; secondly, by the old law, natural-born subjects, or naturalized, or made denizens ; thirdly, by the old law, not attainted of treason or felony ; fourthly, by the old law,

(*a*) 2 Bl. Com. 206 ; 3 Cruise T.  
29. c. 2, § 6 ; Co. Litt. 24 a.  
(*b*) 2 Bl. Com. 207.

(*c*) 2 Bl. Com. 206 ; Co. Litt.  
8 b ; 3 Cruise T. 29. c. 3, § 2 : 2  
Jarm. Wills. 2nd ed. 57, 58.

not obliged to claim through any ancestor whose blood was corrupted by attainder (*a*). 1261.

Pr. III. T. 1.  
Ch. 1, s. 1.

With regard to the fourth of these requisites, which involves a negation of what is termed corruption of blood, a person attainted of treason or felony was, by the common law, neither allowed to retain his former estate, nor to inherit any future one, nor to transmit any inheritance to his issue, either immediately from himself or mediately through himself from any remoter ancestor; for his inheritable blood, which was necessary either to hold, or to take, or to transmit any feudal property, was corrupted and extinguished; so that the estates resulted back and escheated to the lord, subject to the operation of the superior law of forfeiture (*b*). Thus, where A. and B. were brothers, and A. was attainted, and had issue C., and died, and C. purchased lands and died without issue, it was held that B. his uncle could not inherit from him, because he must derive his descent through A., who was the mediate ancestor and incapable. And if a man had two sons and the eldest was attainted, and afterwards the father died seised of an estate in fee, the younger could not inherit from the father; for no other could be heir to the father than the eldest son, while he was alive. It was, however, a general rule that the attainder of a person who need not be mentioned in the derivation of the descent, did not impede, however remote the ancestor might be. Thus, in the case of the attainder of an elder son, if such elder son died in the lifetime of his father without issue, the younger son would then inherit from his father; because he would derive his descent from him without claiming through or mentioning his elder brother (*c*). And as, by the old law, the descent from one brother to another was considered as

Corruption  
of blood.

(*a*) 3 Cruise T. 29, c. 3, § 7  
Burton, § 329. See *infra*, on  
Aliens.

Litt. 8 a.

(*c*) 3 Cruise T. 29, c. 2, § 27—  
30; 2 Bl. Com. 252—255.

(*b*) See 2 Bl. Com. 252—6; Co.

**FR. III. T. 1,**  
**CH. 1, s. 1.** immediate, and not as mediate through the father, whether it was for the purpose of one brother inheriting from the other, or of a descendant of one brother inheriting from a descendant of the other, the attainder of the father did not prevent his sons or their descendants inheriting from each other (a). 1262.

**7 Anne c.**  
**21, s. 10.**

Corruption of blood being looked upon as a peculiar hardship, in most, if not all of the felonies created by Parliament since the reign of Hen. 8, it is declared that they shall not extend to any corruption of blood (b). By a statute passed in 7 Anne, it was enacted, that corruption of blood should cease upon the death of the two grandsons of James II. It was, however, revived by the stat. 39 Geo. 3, c. 93. But by a subsequent stat., 54 Geo. 3, c. 145, it was confined to high treason, petit treason, and murder, and to the crime of abetting, procuring, or counselling the same (c). And by the stat. 3 & 4 Will. 4, c. 106, s. 10, it is enacted, "that when the person from whom the descent of any land is to be traced shall have had any relation, who, having been attainted, shall have died before such descent shall have taken place, then such attainder shall not prevent any person from inheriting such land who would have been capable of inheriting the same, by tracing his descent through such relation, if he had not been attainted, unless such land shall have escheated in consequence of such attainder before the 1st day of January, 1834." 1263.

Heirs of  
illegitimate  
children.

In case the person from whom descent is to be traced is an illegitimate child, there is a fifth requisite, that is, the person claiming as his heir must be a child or other lineal descendant of his; for illegitimate children cannot have any heirs but those of their own bodies. For as all

(a) 3 Cruise T. 29, c. 2, § 31;  
Co. Litt. 8 a; *Kynnaird v. Leslie*,  
L. R. 1 C. P. 389.

(b) 3 Cruise T. 29, c. 2, § 32.  
(c) Id. § 33.

collateral kindred consists in being derived from the same common ancestor, and as a bastard has no legal ancestors, he can have no collateral kindred, and consequently no heirs but such as claim by a lineal descent from himself (a). 1264.

Pr. III. T. 1,  
Ch. 1, s. 1.

Everything which falls under the denomination of real estate descends to the heir. But the general rule is that no chattels, whether real or personal, shall go to the heir, even though expressly limited to a man and his heirs, but shall vest in the executor or administrator for the payment of debts, unless exonerated therefrom by the testator or intestate by deed or will, and subject thereto, in trust for the person or persons entitled to such chattels under the will or under the Statutes of Distribution. Heir-looms, however, descend to the heir along with the inheritance, and do not pass to the executor of the last proprietor. Of this kind are such things as cannot be taken away, without damaging or dismembering the freehold; such as chimney-pieces, pumps, old fixed or dormant tables or benches, and the like. Deer in a real authorised park, while *feræ naturæ*, fishes in a pond, doves in a dove-house, charters and deeds, court rolls, and other evidences of the land, together with the chest in which they were contained, monuments or tombstones in a church, with the pennons and other ensigns of honour, are also heir-looms or in the nature of heir-looms (b). Heir-looms may be sold or disposed of by the owner of the inheritance during his lifetime, since he may dismember the inheritance as he pleases. But he cannot devise them away from the heir; for by his death they are instantly vested in the heir (c). And every species of tree, whether timber or not, standing on the land at the death of the ancestor, together with the grass

What de-  
scends.

(a) 2 Bl. Com. 249; Burton, § 2, 3; Co. Litt. 8 a; *Ford v. 328; Re Don's Estate*, 4 Drew. 194. *Tynte*, 2 Johns. & H. 150.

(b) 2 Bl. Com. 427—8; 1 Cruise (c) 2 Bl. Com. 429; Co. Litt. T. 1, § 5, 6; 3 Cruise T. 29, c. 2, 185 b.

Pr. III. T. 1,  
Ch. 1, s. 1. actually growing, though ripe for cutting, descends to the heir. But corn, and every other vegetable produced annually by labour and cultivation, goes to the executor or administrator of the ancestor, as a compensation for the expense of raising them (a). 1265.

Stat. 45 & 46  
Vict. c. 38,  
s. 37.  
Settled  
Land Act,  
1882.  
Heir-looms.

[And as regards the sale of heir-looms, it is enacted by stat. 45 & 46 Vict. c. 38, s. 37 (Appendix), that, “(1) Where personal chattels are settled on trust so as to devolve with land until a tenant in tail by purchase is born or attains the age of twenty-one years, or so as otherwise to vest in some person becoming entitled to an estate of freehold of inheritance in the land, a tenant for life of the land may sell the chattels or any of them. (2) The money arising by the sale shall be capital money arising under this Act, and shall be paid, invested, or applied and otherwise dealt with in like manner in all respects as by this Act directed with respect to other capital money arising under this Act, or may be invested in the purchase of other chattels, of the same or any other nature, which, when purchased, shall be settled and held on the same trusts, and shall devolve in the same manner as the chattels sold. (3) A sale or purchase of chattels under this section shall not be made without an order of the Court.”] 1265a.

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## SECTION II.

### *Of the Rules of Descent of Estates in Fee Simple, by the Common Law.*

P. III. T. 1,  
Ch. 1, s. 2. To frame rules of descent with accuracy, precision, and perspicuity, so far as perspicuity is compatible with accuracy, is a most difficult task. 1266.

The rules of descent by the common law, which apply to the case of descent upon the death of the owner of an

(a) 3 Cruise T. 29, c. 2, § 4.

estate in fee simple, before the 1st day of January, 1834, Fr. III. T. 1, Ch. 1, s. 2. may be thus stated:—

I. Upon the death of the owner of an estate in fee simple, the descent is to be traced from him, if the title to it which he had at the time of his decease was only an equitable title, or if it was a title by purchase under which he became actually seised, or if he took by descent, but died actually seised thereof. But if the title which he had at the time of his death was a legal title by descent, and he was not actually seised thereof, then the descent is to be traced from the person who died last actually seised thereof. The necessity of an actual seisin, in the case of a legal estate, to constitute a person the root or stock from whom the descent is to be traced, is expressed in the maxim *seisina facit stipitem* (a). 1267.

I. From whom descent is to be traced.

A person originally taking property by descent might, and still may, acquire a new estate therein by purchase, and thus breaking the descent, as it is termed, cause the inheritance to descend as if he had originally acquired the property by purchase (b). Thus, where a person seised of lands as heir on the part of his mother, conveys them to another person in fee, and then such other person reconveys them to the first person in fee, this is a new purchase; and if he dies without issue, the heir on the part of the father shall inherit (c). But where a person seised *ex parte maternâ* made a feoffment in fee, before the year 1834, and expressly limited the use to himself and his heirs, whether in possession or in remainder, he was in of the ancient use, and not by purchase, and therefore the descent was not altered. And so if a person seised *ex parte maternâ* makes a feoffment, and there is no declaration of uses, and the feoffment is not on such a con-

(a) See 2 Bl. Com. 208—9, and Sweet's note, p. 209; 1 Steph. Com. 380—1; 3 Cruise T. 29, c. 3, § 2, 7, 9; Co. Litt. 11 b.

(b) Sweet's Bl. Com. 240; 3 Cruise T. 29, c. 3, § 37—42.

(c) 3 Cruise T. 29, c. 3, § 38—9; Burton, § 333; Co. Litt. 12 b.

Pr. III. T. 1. consideration as to raise a use in the feoffee, so that the use results to the feoffor, the descent is not altered (*a*). 1268.

Actual seisin might be either by entry or claim of the person said to be seised, or by the possession of his own or his ancestor's lessee for years, or of a guardian in socage, or of another tenant in common, or by receiving rent from a lessee of the freehold, or by a devise, or by a conveyance by feoffment or under the Statute of Uses, or, it is conceived, by a statutory release or grant, or, in the case of incorporeal hereditaments, by what is equivalent to the seisin of corporeal hereditaments; such as the receipt of rent, the presenting to a church, and the like. Thus, title by descent to an advowson must be derived from the person who last presented, or, if it is an advowson appendant, from the person who was last seised of the manor (*b*). The entry of the heir upon any part of the estate would give him a seisin in deed of all the land lying in the same county. But where lands lay in different counties, there must have been an entry made in each county (*c*). If the heir was deterred from entering by bodily fear, he might make claim as near as he could. Such claim, however, was only in force for a year and a day; but if repeated once in the space of every year and day, which was called continual claim, it had the same effect as a legal entry (*d*). The entry of the heir was only necessary where the lands were in the actual occupation of the ancestor at the time of his death; for if the lands were held under a lease for years, and there were a tenant in possession, the heir would be considered as having seisin in deed before entry or receipt of rent, because the possession of the lessee for years is his possession (*e*). 1269.

- |   |                                     |
|---|-------------------------------------|
| ( <i>a</i> ) 3 Cruise T. 29, c. 3, § 47;  | 381; 3 Cruise T. 29, c. 3, § 6. 56, |
| Burton, § 334—5; Co. Litt. 12 b           | 57, 59, 61, 63, 66; Co. Litt. 15 a. |
| (3).                                      | ( <i>c</i> ) 1 Cruise T. 1, § 22.   |
| ( <i>b</i> ) Burton, § 302, 303, n. 1241; | ( <i>d</i> ) 1 Cruise T. 1, § 23.   |
| 2 Bl. Com. 209; 1 Steph. Com.             | ( <i>e</i> ) 1 Cruise T. 1, § 24.   |



A devisee in fee in remainder before entry has such a seisin as will make the estate transmissible to his heirs; and therefore where a copyhold is devised to a person in fee in remainder after an estate for life, and the remainderman dies before entry, his customary heir, and not the customary heir of the devisor, is entitled to the copyhold (a). 1270.

PT. III. T. 1.  
CH. 1, s. 2.

If a testator, however, who died before January 1st, 1834, devised to his heir at law, whether by that designation or by name, in such a way that the heir, if he were to take under the will, would only take the same estate as the law would have given him if no such devise to him had been made, the devise was inoperative and void, and the heir took by descent: as where a testator devised to his heir at law in fee, either in possession, or after a previous devise for life or in tail. And the heir took by descent even where the devise was made subject to a pecuniary charge, or to an executory devise over (b). And if an ultimate limitation was made to the grantor in fee or to the right heirs of the grantor in a deed executed before January 1834, it did not give a contingent remainder to the grantor or to his heir at law as a purchaser, but was entirely inoperative; the subject of the ultimate limitation remaining in the grantor as his ancient reversion, and passing to his right heirs in the ordinary course of descent (c). 1271.

## II. The estate shall descend to one or some of the de- II. Descent

(a) *Doe d. Parker v. Thomas*, 3 M. & Gr. 815. As to the descent of a remainder in other cases, or of a reversion, see 3 Cruise T. 29, c. 4, § 3, 16; Burton, § 307. But see *Paterson v. Mills*, 15 Jur. 1.

(b) *Shelford's Real Prop. Acts*, note to 3 & 4 Will. 4, c. 106, s. 3; Burton, § 336—7; 6 Cruise T. 38, c. 8, § 2; 4 Cruise T. 32, c. 16,

§ 25; 2 Sudg. Pow. 17; Co. Litt. 12 b (2); 1 Jarm. Wills, 2nd ed. 62; 2 Id. 49; *Hurst v. Earl of Winchelsea*, 1 Bl. 167; 2 Lord Ken. 444; 2 Ves. Sen. 612; *Manbridge v. Plummer*, 2 My. & K. 93.

(c) *Smith's Executory Interests* annexed to *Fearne*, § 390; *Watk. Conv.* 3rd ed. by *Prest.* 109. See *infra*, par. 1291; Co. Litt. 22 b.

Pr. III. T. 1.  
Ch. 1, s. 2.

to descend-  
ants of  
the propo-  
situs.

Descent  
liable to be  
defeated by  
birth of a  
nearer heir.

scendants of the propositus, that is, the person from whom the descent is to be traced (a). 1272.

Lands shall always descend to the person who is heir at the time of the death of the ancestor, but such descent may be defeated by the subsequent birth of a nearer heir. Thus, where a person dies leaving his wife pregnant, the common law, not considering the infant in ventre matris to be in existence, casts the freehold upon the person who is then heir. But when the posthumous child is born, his guardian may enter upon such heir, and take the estate from him. A posthumous child, however, is not entitled to any of the rents and profits received before his birth (b). If a man has issue a son and a daughter, and the son purchases lands in fee and dies without issue, the daughter shall inherit the land from him. But if afterwards the father has issue a son, the son shall enter into the lands as heir to his brother, and oust his sister. So where a son purchased land and died without issue, and his uncle entered as his heir, and two years afterwards the father had another son, it was held that such other son might enter on his uncle (c). 1273.

III. Descent  
to descend-  
ants (of the  
whole blood)  
of the lineal  
cognominal  
male ances-  
tors of the  
propositus.

III. In default of descendants of the person from whom the descent is to be traced, the inheritance shall never go to any of his lineal ancestors, or to any of his collateral kindred related to him by the half blood, but (except in cases within rule X.) it shall go to one or some of the descendants of one of his lineal cognominal male ancestors

(a) 2 Bl. Com. 208; 3 Cruise T. 29, c. 8, § 10; Co. Litt. 10 b.

(b) 3 Cruise T. 29, c. 3, § 11, 12. In *Richards v. Richards*, 1 Johns. 754, 761, V.-C. Wood held that the posthumous heir is not entitled to any rents and profits which accrued before his birth, even though they had not been received by the interim heir. And Sir G. Jessel,

M. R., decided the same way; and that the interim heir is entitled to them where there is no residuary devise; and the residuary devisee when there is one. *In re Morlem*, L. R. 18 Eq. 9. But see *Goodale v. Gawthorne*, 2 Sm. & Gif. 375.

(c) 3 Cruise T. 29, c. 3, § 13, 14; Burton, § 332; *Rider v. Wood*, 1 K. & J. 644, 652.

(that is, his lineal male ancestors bearing his own surname), such descendants being the collateral kindred of the person from whom the descent is to be traced, related to him by the whole blood, that is, derived from the same couple of ancestors as he himself (*a*). **1274.**

Pr. III. T. 1,  
CH. 1, s. 2.

A father or mother may be cousin to his or her own child, and may inherit from him by virtue of that relationship, although not as a lineal ancestor (*b*). **1275.**

Parent  
inheriting  
as cousin.

Under the old law, the descent from one brother or sister to another is considered as immediate (*c*). **1276.**

Descent  
from a  
brother or  
sister.

Kindred only related by the half blood to the person from whom the descent is to be traced, are such as spring from one common ancestor, but not from the same couple of ancestors (*d*). **1277.**

Half blood.

Where there were two sons or two daughters by different mothers, and a remainder or reversion expectant upon an estate for life was purchased by the father, who died in the lifetime of the tenant for life, and the eldest son or daughter also died in the lifetime of the tenant for life, the half blood would inherit; for in this case the claim was from the father, and all the children were of the whole blood of the father (*e*). And so although the eldest son entered on the death of his father, and took actual possession of the fee simple, yet if the widow of the father was endowed of a third part, by actual assignment, and she entered on the land assigned, or the seisin was actually delivered to her by the sheriff, and then the eldest son died without issue in the lifetime of the widow, the younger brother of the half blood would inherit the reversion of the third part, notwithstanding the elder brother's entry; because the actual seisin which he acquired thereby was defeated by

(*a*) 3 Cruise T. 29, c. 3, § 15, 50—53, 70, 71; 2 Bl. Com. 220—240; Litt. s. 3, 4, 6, 7, 8.

(*b*) 3 Cruise T. 29, c. 3, § 18.

(*c*) Shelford's Real Prop. Acts; 3

Cruise T. 29, c. 2, § 31.

(*d*) 3 Cruise T. 29, c. 3, § 50—53, 65; 2 Bl. Com. 227—243.

(*e*) 3 Cruise T. 29, c. 4, § 14.

Pr. III. T. 1, the endowment, so that the father was last seised, and the  
 Ch. 1, s. 2. younger brother was heir of the whole blood to the  
 father (a). 1278.

IV. Descent  
 to descend-  
 ants of  
 ancestors  
 of a wife  
 of a lineal  
 cognominal  
 male  
 ancestor.

IV. In default of any descendant of a lineal cognominal male ancestor of the person from whom the descent is to be traced, then (subject to rule X.) the inheritance shall descend to one or some of the descendants of one of the ancestors of a wife of a lineal cognominal male ancestor of the person from whom the descent is to be traced; such wife herself being one of his ancestors, and such descendant or descendants of one of her ancestors being related to him by the whole blood (b). 1279.

V. Prefer-  
 ence of  
 males to  
 females,  
 and of  
 eldest male,  
 and co-  
 parcenary  
 among  
 females.

V. As between the several persons constituting each generation of descendants, either of the person from whom the descent is to be traced, or of any of his ancestors, the male sex shall be preferred to the females. And of the males, the eldest shall inherit by himself; but where there are no males, all the females shall inherit together as coparceners (c). 1280.

VI. Right of  
 proximity  
 and right of  
 representa-  
 tion among  
 descend-  
 ants.

VI. In searching among the descendants of the person from whom the descent is to be traced, or the descendants of any of his ancestors, for the heir or heirs at law, each less remote generation of descendants of such person or ancestor, beginning with the child or children of such person or ancestor, is to be regarded, if dead at the time when the descent is to be traced, as transmitting to the next more remote generation its own right of inheritance, subject to the same rules respecting the preference of males, the priority of the eldest male, the coparcenary of females, and the exclusion of half blood. But subject to this right of representation and to those rules, the right of pro-

(a) 3 Cruise T. 29, c. 4, § 13; Co. Litt. 15 a; Watkins on Descent, 4th ed. by Williams, 74 n. (c); Parke on Dower, 343.

(b) 2 Bl. Com. 234, 337—8; 3

Cruise T. 29, c. 3, § 70, 71; Litt. s. 4.

(c) 2 Bl. Com. 212—214; 3 Cruise T. 29, c. 3, § 20, 21, 24; Litt. s. 5; Co. Litt. 14 a.

pinquity prevails; that is, the less remote descendants, if living, take before the more remote. As, if a man has two sons, A. and B., and A. dies leaving two sons, and then the grandfather dies; the eldest son of A. shall succeed to the whole of his grandfather's estate: and if A. has left only two daughters, they would have succeeded also to equal moieties of the whole, in exclusion of B. and his issue. Again, if a man has only three daughters, C., D., and E.; and C. dies leaving two sons, D. leaving two daughters, and E. leaving a daughter and a son who is younger than his sister; and then the grandfather dies; the eldest son of C. shall succeed to one-third, in exclusion of the younger; the two daughters of D. to another third in coparcenary; and the son of E. to the remaining third, in exclusion of his elder sister. And the same right of representation, guided and restrained by the same rules of descent, prevails downwards in infinitum (*a*). This is called a succession in stirpes, since the succession of the branches is regulated by the right of their respective roots (*b*). **1281.**

VII. One or some of the descendants of a less remote lineal cognominal male ancestor, shall be preferred to one or some of the descendants of a more remote lineal cognominal male ancestor (*c*). **1282.**

VII. Preference of descendants of a less remote lineal cognominal male ancestor.

VIII. But (according to Blackstone) one or some of the descendants of one of the ancestors of the wife of a more remote lineal cognominal male ancestor, shall be preferred to one or some of the descendants of one of the ancestors of the wife of a less remote lineal cognominal male ancestor (*d*). **1283.**

VIII. Preference of descendants of the ancestors of the wife of a more remote lineal cognominal male ancestor.

IX. In searching among the collateral kindred of the wife of any lineal male cognominal ancestor (being herself

IX. In searching among the

(*a*) 2 Bl. Com. 219; Co. Litt. 10 b.

Prop. Acts, 273.

(*b*) 2 Bl. Com. 217, 219; 3 Cruise T. 29, c. 3, § 26, 27, 29, 76.

(*d*) 2 Bl. Com. 237—239; Sugd. Real Prop. Acts, 273; Burton, § 324. But see 3 Cruise T. 29, c. 3, § 81—85.

(*c*) 2 Bl. Com. 225—6; Sugd. Real

Pr. III. T. 1,  
Ch. 1, s. 2.

collateral  
kindred  
of the wife  
of a lineal  
cognominal  
male  
ancestor,  
same rules  
apply as if  
such wife  
were herself  
the pro-  
positus.

X. Descent  
from a per-  
son whose  
title was by  
descent.

an ancestor of the person from whom the descent is to be traced), for the heir or heirs at law of the last owner, the same rules are to be observed as if such female ancestor were herself the person from whom the descent is to be traced, so that the person or persons who would be entitled to inherit to such female ancestor, were she the person from whom the descent is to be traced, shall, in default of a nearer heir, be the heir of the last owner (a). 1284.

X. When the title which the person from whom the descent is to be traced, had at the time of his decease, was a title by descent, the person or persons to take as heir or heirs must be of the blood of the ancestor or ancestors through whom the inheritance has passed, so far as the descent of the inheritance can be traced. For, others have none of the blood of the first purchaser in them, and therefore shall never succeed (b). The first purchaser is he who first acquired the estate to his family, whether the same was acquired by sale, or by gift, or by any other method, except only that of descent (c). 1285.

The consequence of this rule is, that, if the title which the person from whom the descent is to be traced, had at his death, was a title by descent from his mother, the land, on failure of heirs ex parte maternâ, shall escheat, rather than pass to his heirs ex parte paternâ. And so if his title was by descent from his father's father, the relations of his father's mother shall not inherit, but only those of his father's father, that is, the descendants, of the whole blood of his lineal cognominal male ancestors, and the descendants, of the whole blood, of the ancestors of their wives, from whom he is descended, other than the descendants

(a) See Report of Commissioners in Shelford's Real Prop. Acts; Burton, § 325.

(b) Burton, § 326; 2 Bl. Com. 222, 239—240; 3 Cruise T. 20, c. 3,

§ 30—35; Litt. s. 4; Co. Litt. 12 a, 13 a. See *Heywood v. Heywood*, 3 Beav. 317.

(c) 2 Bl. Com. 220.

of the ancestors of the wives of his grandfather and father (a). **1286.**

Pr. III. T. 1.  
Ch. 1, s. 2.

Inheritance descendible to heirs ex parte maternâ cannot be created by any act of the parties ; for if a person gives lands to another to hold to him and his heirs on the part of his mother, yet his heirs on the part of his father shall inherit. For no person can create a new kind of inheritance ; so that the words "on the part of the mother" are void (b). **1287.**

Where the legal estate descends ex parte maternâ, and the equitable estate ex parte paternâ, or vice versâ, the equitable estate will merge in the legal, and both will follow the line through which the legal estate descends (c). **1288.**

XI. When, in a case falling within rule X., the descent of the inheritance cannot be traced beyond a particular ancestor, so that it is not known from whom he inherited it, or whether he took it by descent or purchase, or if it is known that the title which he had at the time of his death was a title by purchase ; then any one or more of the collateral relations of such ancestor may inherit who would be the heir or heirs of such ancestor, were such ancestor the person from whom the descent is to be traced (d). **1289.**

### SECTION III.

*Of the Rules of Descent of Estates in Fee Simple, as altered by the Statute (e).*

The rules of descent as altered by the stat. 3 & 4 Will. 4, c. 106, which apply in the case of descent upon the

Pr. III. T. 1.  
Ch. 1, s. 3.

(a) 2 Bl. Com. 222, 239, 240 ; 3 Cruise T. 29, c. 3, § 36 ; Burton, § 326 ; Co. Litt. 12 a, 13 a.

(b) Co. Litt. 13 a ; 3 Cruise T. 29, c. 3, § 36.

(c) 3 Cruise T. 29, c. 3, § 44.

(d) 2 Bl. Com. 223.

(e) " Except where the nature of the provision or the context shall exclude such construction, the word 'land' shall extend to manors, advowsons, messuages, and all other

Pr. III. T. 1,  
Ch. 1, s. 3.

death of the owner of an estate in fee simple on or subsequent to the 1st of January, 1834, may be thus stated—

I. From  
whom the  
descent is  
to be traced.

I. "In every case descent shall be traced from the purchaser; and to the intent that the pedigree may never be carried farther back than the circumstances of the case and the nature of the title shall require, the person last entitled to the land shall be considered to have been the purchaser thereof, unless it shall be proved that he inherited the same; in which case the person from whom he inherited the same shall be considered to have been the purchaser, unless it shall be proved that he inherited the same: and in like manner the last person from whom the land shall be proved to have been inherited, shall, in

hereditaments, whether corporeal or incorporeal, and whether freehold or copyhold, or of any other tenure, and whether descendible according to the common law, or according to the custom of gavelkind or borough-English, or any other custom, and to money to be laid out in the purchase of land, and to chattels and other personal property transmissible to heirs, and also to any share of the same hereditaments and properties or any of them, and to any estate of inheritance, or estate for any life or lives or other estate transmissible to heirs, and to any possibility, right, or title of entry or action, and any other interest, capable of being inherited, and whether the same estates, possibilities, rights, titles, and interests, or any of them, shall be in possession, reversion, remainder, or contingency; and the words 'the purchaser' shall mean the person who last acquired the land otherwise than by descent, or than by any escheat, partition, or inclosure, by the effect of which the land shall have become part of or descendible

in the same manner as other land acquired by descent; and the word 'descent' shall mean the title to inherit land by reason of consanguinity, as well where the heir shall be an ancestor or collateral relation, as where he shall be a child or other issue; and the expression 'descendants' of any ancestor shall extend to all persons who must trace their descent through such ancestor; and the expression 'the person last entitled to land' shall extend to the last person who had a right thereto whether he did or did not obtain the possession or the receipt of the rents and profits thereof; and the word 'assurance' shall mean any deed or instrument (other than a will) by which any land shall be conveyed or transferred at law or in equity; and every word importing the singular number only shall extend and be applied to several persons or things as well as one person or thing; and every word importing the masculine gender only shall extend and be applied to a female as well as a male" (s. 1).



every case, be considered to have been the purchaser, Pr. III. T. 1, Ch. 1, s. 3. unless it shall be proved that he inherited the same" (s. 2): except that it would seem that where the person who died last entitled left issue, the descent is to be traced from him, even though such person inherited the land; so that when a coparcener dies, leaving issue, it has been very properly held, that the whole of her share goes to her issue, instead of being divisible between her issue and the other coparcener or coparceners as heirs of the purchaser (a). And by the stat. 22 & 23 Vict. c. 35, s. 19, "where there shall be a total failure of heirs of the purchaser, or where any land shall be descendible as if an ancestor had been the purchaser thereof, and there shall be a total failure of the heirs of such ancestor, then and in every such case the land shall descend and the descent shall thenceforth be traced from the person last entitled to the land as if he had been the purchaser thereof." And by s. 20, this enactment is to be read as part of the stat. 3 & 4 Will. 4, c. 106. 1290.

By s. 3, "when any land shall have been devised by any testator who shall die after the 31st day of December, 1833, to the heir, or to the person who shall be the heir of such testator, such heir shall be considered to have acquired the land as a devisee, and not by descent; and when any land shall have been limited by any assurance executed after the said 31st of December, 1833, to the person, or to the heirs of the person, who shall thereby have conveyed the same land, such person shall be considered to have acquired the same as a purchaser by virtue of such assurance, and shall not be considered to be entitled thereto as his former estate, or part thereof" (b). And by s. 4, "when any person shall have acquired any land by purchase under a limitation to the heirs or to the

Devised to heir of testator.

Limitation to the grantor or his heirs.

Limitation to the heir or heirs of

(a) Sugd. Real Prop. Acts, 276, (b) See supra, par. 1271.  
281—284.

Pr. III. T. 1.  
Ch. 1, s. 3.

the body of  
a person's  
ancestor.

heirs of the body of any of his ancestors, contained in an assurance executed after the 31st of December, 1833, or under a limitation to the heirs or to the heirs of the body of any of his ancestors, or under any limitation having the same effect, contained in a will of any testator who shall depart this life after the 31st day of December, 1833, then, and in any of such cases, such land shall descend, and the descent thereof shall be traced, as if the ancestor named in such limitation had been the purchaser of such land." 1291.

II. Descent  
to descend-  
ants.

II. The estate shall descend to one or some of the descendants of the person from whom the descent is to be traced (a). 1292.

III. Descent  
to lineal  
cognominal  
male  
ancestors  
and their  
descend-  
ants.

III. "No brother or sister shall be considered to inherit immediately from his or her brother or sister; but every descent from a brother or sister shall be traced through the parent" (b). And in default of descendants of the purchaser, the inheritance shall go to one of his lineal cognominal male ancestors, or to one or some of the descendants of one of such lineal cognominal male ancestors (c). 1293.

IV. Descent  
to the lineal  
cognominal  
male  
ancestors'  
wives, or  
their  
descendants  
of the half  
blood, or  
their  
ancestors,  
or the  
descendants  
of such  
ancestors.

IV. In default of lineal cognominal male ancestors and their descendants, the inheritance shall go to some lineal cognominal male ancestor's wife from whom the purchaser was descended, or to one or some of the descendants from her by another husband, who are related to the purchaser by the half blood, or, if there are no such descendants, to one of her ancestors, or to one or some of their descendants, her collateral kindred (d). 1294.

V. Descent  
to the half  
blood  
through a  
male  
ancestor.

V. A person or persons collaterally related to the purchaser by the half blood, through a male ancestor, shall inherit next after his, her, or their brothers and sisters

(a) 2 Bl. Com. 208. See supra, par. 1272.

s. 6; supra, par. 1274.

(b) 3 & 4 Will. 4, c. 106, s. 5.

(d) Stat. 3 & 4 Will. 4, c. 106, ss. 6—9, infra, par. 1298, 1302—4.

(c) Stat. 3 & 4 Will. 4, c. 106,

related to him by the whole blood, and their descendants (a). 1295.

Pr. III. T. 1,  
Ch. 1, s. 3.

VI. As between the several persons constituting each generation of the descendants of the purchaser, or each generation of the descendants of any couple of ancestors from whom the purchaser was descended, or each generation of the descendants of any ancestor of the purchaser who are related to him by the half blood, the male sex shall be preferred to the female ; and of the males, the eldest shall inherit by himself ; but where there are no males, all the females shall inherit together as coparceners (b). 1296.

VI. Preference of the males to the females, and of the eldest male, and coparcenary among females.

VII. In searching amongst the descendants of the purchaser or of any one of his ancestors, for the heir or heirs at law, each less remote generation of descendants of such purchaser or ancestor, beginning with the child or children of such purchaser or ancestor, shall be regarded, if dead at the time when the descent is to be traced, as transmitting to the next more remote generation its own right of inheritance, subject to the same rules respecting the preference of males, the priority of the eldest male, the coparcenary of females, and the preference of the whole blood (c). But, subject to this right of representation, and to those rules, the right of propinquity prevails, that is, the less remote descendants, if living, take before the more remote. 1297.

VII. Right of propinquity, and right of representation among descendants.

VIII. Any lineal cognominal male ancestor shall be preferred to his descendants, the collateral kindred of the purchaser ; and of the lineal cognominal male ancestors, the less remote and his descendants shall be preferred to the more remote and his descendants. The words of the statute are these : " Every lineal ancestor shall be capable of being heir to any of his issue ; and in every case where there shall be no issue of the purchaser, his nearest lineal ancestor shall be his heir in preference to any person who

VIII. Preference of lineal cognominal male ancestor to his descendants.

Preference of the less remote lineal cognominal male ancestor and his descendants.

(a) Stat. 3 & 4 Will. 4, c. 106, s. 9, *infra*, par. 1304.

(c) 2 Bl. Com. 219. See *supra*, par. 1281.

(b) 2 Bl. Com. 212—214.

Pr. III. T. 1,  
Ch. 1, s. 3.

would have been entitled to inherit, either by tracing his descent through such lineal ancestor, or in consequence of there being no descendant of such lineal ancestor, so that the father shall be preferred to a brother or sister, and a more remote lineal ancestor to any of his issue, other than a nearer lineal ancestor or his issue" (a). 1298.

The meaning of the first words of this section is, "Every lineal ancestor shall be capable of being heir to any of his issue capable of inheriting from him" (b). So that it does not give the father of an illegitimate child the right of inheriting such child's estate. 1299.

IX. Preference of the wives to their issue related by the half blood. Preference of the wife of a more remote ancestor, and her descendants, ancestors, and collateral kindred.

IX. The wife of a lineal cognominal male ancestor shall be preferred to her descendants, related to the purchaser by the half blood; and of the several lineal cognominal male ancestors' wives from whom the purchaser was descended, the wife of the more remote, and her descendants, ancestors, and collateral kindred, shall inherit before the wife of the less remote, and her descendants, ancestors, and collateral kindred (c). 1300.

X. In searching among the ancestors and collateral kindred of the wife of a male ancestor, the same rules apply as if she were herself the purchaser.

X. In searching among the ancestors and collateral kindred of the wife of any lineal cognominal male ancestor (being herself an ancestor of the purchaser) for the heir or heirs at law of the last owner, the same rules are to be observed as if such female ancestor were herself the purchaser; so that the person or persons who would be entitled to inherit to such female ancestor, were she the purchaser, shall, in default of a nearer heir, be the heir or heirs of the last owner (d). 1301.

Words of the Act.

The words of the statute, besides those already quoted, relating to the subject of the foregoing rules, are these:—

Preference

"None of the maternal ancestors of the person from

(a) Stat. 3 & 4 Will. 4, c. 106, s. 6.

(b) *Re Don's Estate*, 4 Drew. 194, 203.

(c) Stat. 3 & 4 Will. 4, c. 106, ss. 8, 9. See *infra*, par. 1303, 1304.

(d) See report of Commissioners in *Shelford's Real Property Act*.

whom the descent is to be traced, nor any of their descendants, shall be capable of inheriting until all his paternal ancestors and their descendants shall have failed; and no female paternal ancestor of such person, nor any of her descendants, shall be capable of inheriting until all his male paternal ancestors and their descendants shall have failed; and no female maternal ancestor of such person, nor any of her descendants, shall be capable of inheriting until all his male maternal ancestors and their descendants shall have failed" (s. 7). **1302.**

Pr. III. T. 1.  
Ch. 1, s. 3.

of paternal  
line to  
maternal.

Preference  
of male  
paternal  
line to  
female.

Preference  
of male  
maternal  
line to  
female.

"Where there shall be a failure of male paternal ancestors of the person from whom the descent is to be traced, and their descendants, the mother of his more remote male paternal ancestor, or her descendants, shall be the heir or heirs of such person, in preference to the mother of a less remote male paternal ancestor, or her descendants; and where there shall be a failure of male maternal ancestors of such person, and their descendants, the mother of his more remote male maternal ancestor, or her descendants, shall be the heir or heirs of such person, in preference to the mother of a less remote male maternal ancestor, and her descendants" (s. 8). **1303.**

Preference  
of mother  
of more  
remote male  
ancestor,  
and her  
descendants,  
to  
mother of  
less remote  
and her  
descendants.

"Any person related to the person from whom the descent is to be traced by the half blood shall be capable of being his heir; and the place in which any such relation by the half blood shall stand in the order of inheritance, so as to be entitled to inherit, shall be next after any relation in the same degree of the whole blood, and his issue, where the common ancestor shall be a male, and next after the common ancestor where such common ancestor shall be a female, so that the brother of the half blood on the part of the father shall inherit next after the sisters of the whole blood on the part of the father and their issue, and the brother of the half blood on the part of the mother shall inherit next after the mother" (s. 9). **1304.**

Half blood.

Pr. III. T. 1.  
Ch. 1, s. 3.

Summary of  
alterations.

The alterations made by the statute are these :—

1. The cases of title by purchase are increased. And descent is to be traced from the purchaser, without being impeded by corruption of blood (*a*), and without reference to seisin, except that it would seem that where the person who died last entitled left issue, the descent is to be traced from him, whether he was the purchaser or not. 1305.

2. Every descent from a brother or sister is to be traced through the parent. 1306.

3. Ancestors are capable of inheriting property directly from their descendants. 1307.

4. The collateral kindred of the last owner related to him by the half blood are capable of inheriting. 1308.

The order in which the different classes of kindred succeed to an estate, of which the person last entitled was the purchaser, may be stated, in general terms, thus :—

Order of  
succession  
of different  
classes of  
kindred by  
the old and  
the new  
law, when  
stated  
generally.

#### BY THE OLD LAW.

I. The issue of the propositus.

II. The descendants (of the whole blood) of his lineal cognominal male ancestors, other than any of such ancestors themselves.

III. The descendants (of the whole blood) of the ancestors of the wives of his lineal cognominal male ancestors. 1309.

#### BY THE NEW LAW.

I. The issue of the propositus.

II. His lineal cognominal male ancestors, or their descendants, first of the whole blood, other than any of such ancestors themselves, and then of the half blood.

III. The wives of his lineal cognominal male ancestors, or the descendants (of the half blood) of such wives, or the ancestors of such wives, or the descendants (first of the whole blood, and then of the half blood) of the ancestors of such wives. 1310.

(*a*) *Supra*, par. 1262—3.

The order in which the members of each of these three classes take, as between themselves, is pointed out in the foregoing rules ; from which it will be perceived, that sometimes it is determined by propinquity, sometimes by representation, and sometimes by what is termed worthiness of blood, that is, the preference of the male line to the female line, or the whole blood to the half. **1311.**

Pr. III. T. 1,  
Ch. 1, s. 3.

#### SECTION IV.

##### *Of the Descent of Estates Tail.*

The person to whom an estate tail is originally given or limited is the first purchaser of it ; and none but those who are lineally descended from him can derive a title to it by descent (a). **1312.**

Pr. III. T. 1,  
Ch. 1, s. 4.

Who is the purchaser.  
Descent to his lineal descendants alone.

In some cases the descent of an estate tail is restrained to the lineal descendants of one sex, as in the case of estates in tail male, or to those who are born of a particular woman, or begotten by a particular man, as in the case of estates in tail special (b). **1313.**

Descent sometimes confined to descendants of one sex or by one man or woman.

In all cases of entail male, the right of primogeniture exists ; and where females are not excluded, they all take in coparcenary, in the same manner as in the case of a descent in fee simple (c). **1314.**

Primogeniture.  
Coparcenary.

The descent of an estate tail may be defeated by the subsequent birth of a nearer heir in tail. Thus, if a tenant in tail general dies, leaving a daughter, and afterwards his wife is delivered of a son, such son may oust his sister (d). **1315.**

Birth of a nearer heir.

The maxim that *seisina facit stipitem* never applied to the descent of estates tail ; it being only necessary, in deriving a title to an estate of this kind by descent, to

Rule of *seisina facit stipitem* does not apply.

(a) 3 Cruise T. 29, c. 5, § 2.

(c) 3 Cruise T. 29, c. 5, § 3.

(b) 3 Cruise T. 29, c. 5, § 3. See supra, par. 394—5.

(d) 3 Cruise T. 29, c. 5, § 4.

**Pr. III. T. 1,** deduce the pedigree from the first purchaser, and to show  
**Ch. 1, s. 4.** that the claimant is heir to him (a). **1316.**

**Half blood**  
**not ex-**  
**cluded.**

Nor did the exclusion of the half blood take place in the descent of estates tail; because the descent is from the first purchaser or original donee of the estate, and the issue in tail is always of the whole blood to the donee (b).

**Corruption**  
**of blood.**

Nor did corruption of blood affect the descent of an estate tail (c). **1317.**

## SECTION V.

### *Of Descent by Special Custom.*

**Pr. III. T. 1,** In customary descents the ordinary rules of descent  
**Ch. 1, s. 5.** — apply, except so far as they are inconsistent with the custom (d). **1318.**

**I. Descent**  
**of gavelkind**  
**lands.**

I. The lineal descent of lands held in gavelkind is among all the sons, as coparceners; and in default of sons, among all the daughters, in the same manner. But though females claiming in their own right are postponed to males, yet they may inherit together with males by representation. For the right of representation exists in gavelkind descents as well as in descents at common law (e). And it applies to the collateral line as well as to the right line, and to the remoter issue of lineal or collateral relatives as well as to the children of such relatives (f). **1319.**

The partible quality of lands held in gavelkind is not confined to the right line, but is the same in the collateral one (g). **1320.**

Although an estate tail is a kind of inheritance introduced by the statute *De Donis Conditionalibus*, yet this partible quality extends to it; for if a person dies seised

(a) 3 Cruise T. 29, c. 5, § 5.

(e) 3 Cruise T. 29, c. 5, § 11;

(b) Co. Litt. 15 b; Litt. s. 265;

Burton, § 313.

3 Cruise T. 29, c. 5, § 6.

(f) *Hook v. Hook*, 1 Hem. & Mil.

(c) 3 Cruise T. 29, c. 5, § 7.

43.

(d) *Hook v. Hook*, 1 Hem. & Mil. 43.

(g) 3 Cruise T. 29, c. 5, § 12.



in tail of lands held in gavelkind, all his sons shall inherit together as heirs of his body (a). 1321.

Pr. III. T. 1,  
Ch. 1, s. 5.

Descendible freeholds are also partible, where the lands are held in gavelkind; as if a lease is made of lands of this kind to a man and his heirs, during the life of A., and the lessee dies, leaving A., the lands descend to all his sons as special occupants (b). 1322.

The exclusion of the half blood takes place in the descent of lands held in gavelkind, under the old law (c). 1323.

In the case of gavelkind lands, corruption of blood never interrupted the descent, unless, in consequence of the criminal's escape, it was followed by outlawry (d). 1324.

II. Lands of borough-English tenure descend to the youngest son (e). This custom extends to estates tail, and also to descendible freeholds (f). The right of representation takes place in the descent of lands held in borough-English: so that if the youngest son dies in the lifetime of his father, leaving a daughter, she will inherit the lands (g). The custom of borough-English, is, however, ordinarily confined to lineal descents; so that where lands held in borough-English descend to the youngest son, and he dies without issue, they do not go to the younger brother, but the eldest brother inherits. By some customs the youngest brother shall inherit; but this extension of borough-English to the collateral line must be specially pleaded (h). 1325.

II. Descent  
of borough-  
English  
lands.

These customary descents in gavelkind and borough-English cannot be altered by any limitation of the parties. And therefore where A., seised in fee of lands held in

Gavelkind  
and  
borough-  
English  
cannot be  
altered.

(a) 3 Cruise T. 29, c. 5, § 13.

(b) 3 Cruise T. 29, c. 5, § 14.

(c) 3 Cruise T. 29, c. 5, § 15.

(d) Burton, § 319.

(e) 3 Cruise T. 29, c. 5, § 16;  
Burton, § 314.

(f) 3 Cruise T. 29, c. 5, § 17.

(g) 3 Cruise T. 29, c. 5, § 18.

(h) 3 Cruise T. 29, c. 5, § 19. As  
to the degree of extension to the  
collateral line, see *Muggleton v.*  
*Barnett*, 2 Hurls. & Norm. 653.

Pr. III. T. 1,  
Ch. 1, s. 5.

borough-English, made a feoffment to the use of himself and the heirs male of his body according to the course of the common law, the words "according to the course of the common law" were held void (*a*). 1326.

III. Descent  
of copy-  
holds.

III. Estates held by copy of court roll are in general descendible in the same manner as estates held in socage; though in some manors a different mode of descent is established by custom (*b*). That seisin of the heir which constituted him a tenant from whom the inheritance was to be derived on a future descent, was obtained, as in freeholds, by mere entry without admittance (*c*). 1327.

Where a customary freehold or a copyhold estate has been derived from the mother's side, it will go to the heirs on the part of the mother, unless the copyholder disposes of it, and acquires a new estate by purchase (*d*). 1328.

The half blood is excluded in the case of copyholds, under the old law (*e*). 1329.

IV. Custom  
as to descent  
construed  
strictly.

IV. Where the customary descent is different from that by the common law, it is construed strictly; for the law does not take notice of any special customs of this kind, except gavelkind and borough-English, unless they are expressly pleaded; and then the Courts will not carry them farther than the words of the custom. Hence if a custom is alleged that the eldest daughter shall solely inherit, the elder sister shall not inherit by force of that custom. So if the custom is, that the eldest daughter and the eldest sister shall inherit, the eldest aunt shall not inherit (*f*). 1330.

(*a*) 3 Cruise T. 29, c. 5, § 20.

(*b*) 3 Cruise T. 29, c. 5, § 21; 3 Cruise T. 10, c. 3, § 16; Burton, § 1307.

(*c*) Burton, § 1308.

(*d*) 3 Cruise T. 29, c. 5, § 26;

*Nanson v. Barnes*, L. R. 7 Eq. 250.

(*e*) 3 Cruise T. 29, c. 5, § 27.

(*f*) 3 Cruise T. 29, c. 5, § 32, 34.

## A TABLE OF DESCENT,

EXEMPLIFYING THE ORDER IN WHICH THE KINDRED OF  
A PROPOSITUS STAND AS REGARDS THE RIGHT OF  
SUCCESSION, WHERE HE DIED WITHOUT ISSUE.

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In the following Table, the figures placed *above* the person mentioned, show the order according to the *New Law*. The figures placed *below*, within ( ), show the order according to the *Old Law*.

There are two distinct sets of rules referred to—the one under the *Old Law* (pp. 532—541), the other under the *New Law* (pp. 514—546).

The search is to be made *up* the line of *Lineal Cognominal Male Ancestors*, and *down* the line of *their wives*. This is *the leading principle*; and it appeared to the writer that a Table so arranged was better adapted to illustrate this principle, and give the student a clear and accurate notion of the course of descent, than the zigzag or sinuous mode usually adopted.

<b>PROPOSITUS's Lineal Cognominal Male Ancestors,</b> Taking by the <i>New Law</i> , according to Rules III., VIII., But excluded by the <i>Old Law</i> , according to Rule III.	<b>PROPOSITUS's Collateral Kindred, being the Descendants of his Lineal Cognominal Male Ancestors and of their Wives.</b>			<b>PROPOSITUS's Female Ancestors, the Wives of his Lineal Cognominal Male Ancestors,</b> Taking by the <i>New Law</i> , according to Rules IV., IX., But excluded by the <i>Old Law</i> , according to Rule III.
	<i>Kindred of the HALF Blood, through a Lineal Cognominal Male Ancestor,</i> Taking by the <i>New Law</i> , according to Rules V., VI., VII., VIII., But excluded by the <i>Old Law</i> , according to Rule III.	<i>Kindred of the WHOLE Blood, through a Lineal Cognominal Male Ancestor and his Wife, being a Female Ancestor,</i> Taking by the <i>New Law</i> , according to Rules III., V., VI., VII., VIII., And also by the <i>Old Law</i> , according to Rules III., V., VI., VII.	<i>Kindred of the HALF Blood, through the Wife of a Lineal Cognominal Male Ancestor,</i> Taking by the <i>New Law</i> , according to Rules IV., VI., VII., IX., But excluded by the <i>Old Law</i> , according to Rule III.	

Father of  
WALTER STILES  
unknown.

7  
WALTER STILES,  
the Great  
Grandfather  
of  
Propositus.

Mother of  
WALTER STILES  
unknown.

10  
CHRISTIANA  
SMITH,  
the Great  
Grandmother  
of  
Propositus.

Descendants  
of  
WM. SMITH,  
not by  
JANE KING,  
but by another  
Wife.

13  
Descendants  
of  
WM. SMITH,  
not by  
JANE KING,  
(4)

35  
Descendants  
of  
JANE KING,  
not by  
WM. SMITH,  
but by another  
Husband.

4  
GEORGE STILES,  
the  
Grandfather  
of  
Propositus.

9  
Descendants of  
WALTER STILES,  
not by  
CHRISTIANA  
SMITH,  
but by another  
Wife.

8  
Descendants of  
WALTER STILES  
and  
CHRISTIANA  
SMITH.  
(3)

11  
Descendants of  
CHRISTIANA  
SMITH,  
not by  
WALTER STILES,  
but by another  
Husband.

33  
CECILIA KEMPE,  
the  
Grandmother  
of  
Propositus.

or one or some of  
lateral Kindred, by  
Law; (9)  
35  
or one of her Ance-  
stors, or one or some of her  
lateral Kindred, by  
Law, taking in  
manner.

1  
GEOFFREY  
STILES,  
the Father  
of  
Propositus.

6  
Descendants of  
GEORGE STILES,  
not by  
CECILIA KEMPE,  
but by another  
Wife.

5  
Descendants of  
GEORGE STILES,  
and  
CECILIA KEMPE.  
(2)

34  
Descendants of  
CECILIA KEMPE,  
not by  
GEORGE STILES,  
but by another  
Husband.

36  
LUCY BAKER,  
the Mother  
of  
Propositus.

or one or some of  
lateral Kindred, by  
Law; (10)  
38  
or one of her Ance-  
stors, or one or some of her  
lateral Kindred, by  
Law, taking in  
manner.

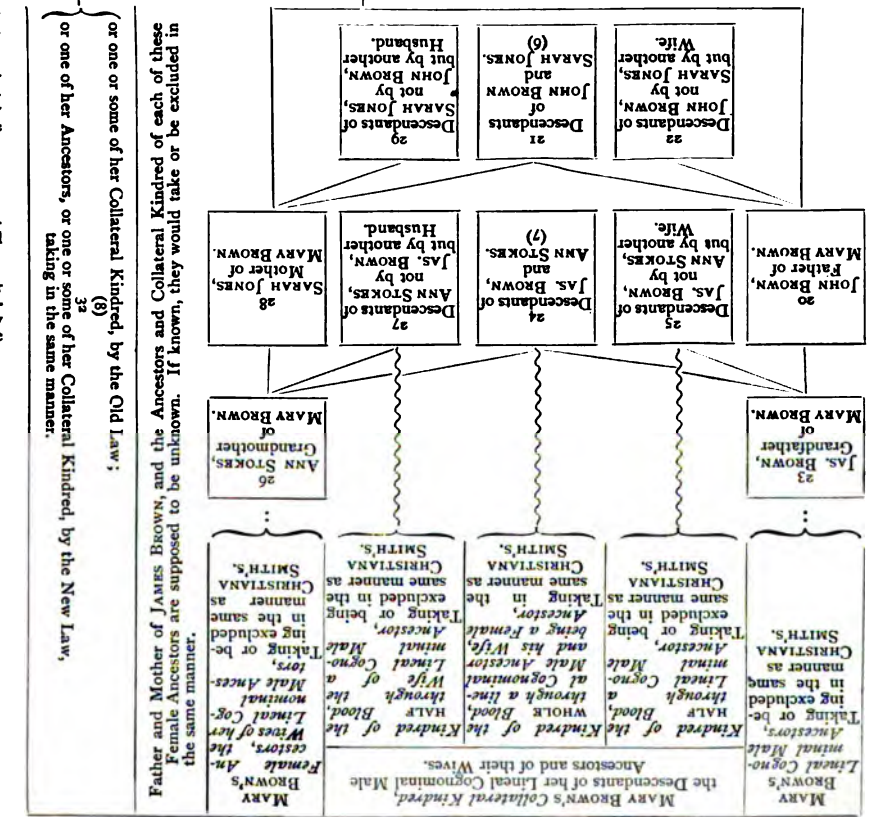
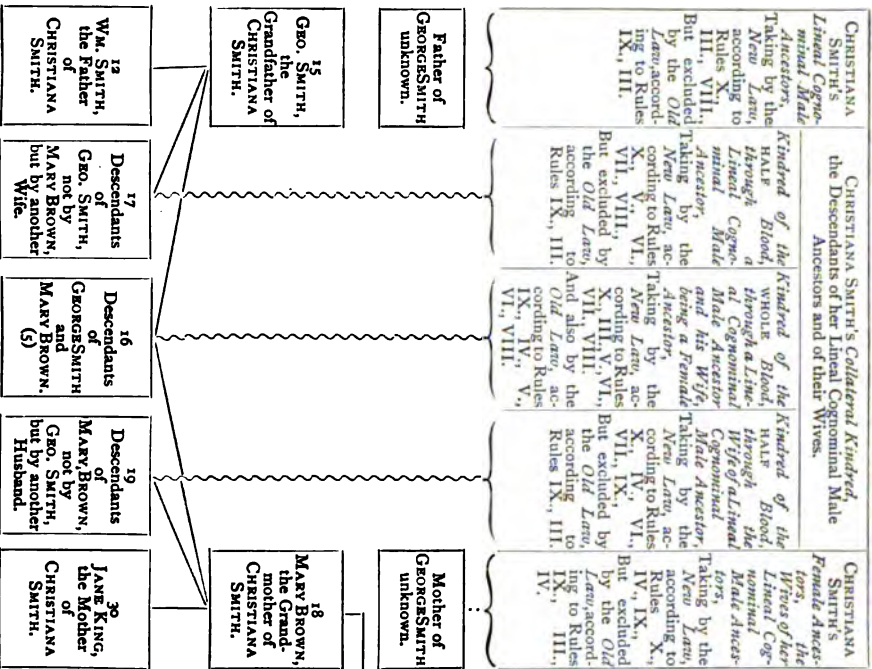
3  
Descendants of  
GEOFFREY  
STILES,  
not by  
LUCY BAKER,  
but by another  
Wife.

2  
Descendants of  
GEOFFREY  
STILES,  
and  
LUCY BAKER.  
(1)

37  
Descendants of  
LUCY BAKER,  
not by  
GEOFFREY  
STILES,  
but by another  
Husband.

JOHN STILES,  
the Propositus or person  
from whom descent is  
to be traced.  
See Rule I., pp. 533, 542.

[Directions as to this TABLE are given in the preceding





## CHAPTER II.

## OF SUCCESSION.

SUCCESSION is the devolution or transmission of real or personal property, on the death of, and from persons in a corporate character, to other persons who succeed them in that character. **1331.**

PART III.  
T. 1, CH. 2.  
Definition.

Real estate passes from corporations to their successors, as it does from natural persons to their heirs. **1332.**

Succession  
to real  
estate.

Chattels real and personal, whether the word successors is used or not, pass by succession, by the common law, in the case of the Sovereign and all aggregate corporations, who, in judgment of law, never die, and of such single corporations as are heads of an aggregate body, whom they represent, which never dies ; such as a master of an hospital or a dean. And they may so pass, by special custom, in the case of certain other sole corporations, for some purposes. But generally no such right of succession exists in the case of sole corporations ; because, if a chattel interest granted to a sole corporation and its successors were allowed to devolve to such successors, the property thereof must be in abeyance from the death of one owner until the appointment of the successor ; and this is contrary to the nature of a chattel interest, which can never be in abeyance, or without an owner, but a man's right therein, when once suspended, is gone for ever (*a*). And hence if a lease for years is made to a bishop, parson, or other sole corporation, and his successors, it will go to the executors of the lessee (*b*). **1333.**

Succession  
to personal  
estate.

(*a*) 2 Bl. Com. 430—432 ; Co. Litt. 9 a (1) ; 46 b ; Watk. Conv. 3rd ed. by Prest. 258.

(*b*) Co. Litt. 46 b ; 2 Bl. Com. 431 ; 1 Cruise T. 8, c. 1, § 25 ; Watk. Conv. 3rd ed. by Prest. 258.

## CHAPTER III.

## OF ADMINISTRATION (a).

## SECTION I.

*Of Debts.**I. Debts generally, and their different Kinds.*

Pr. III. T. 1,  
Ch. 3, s. 1.

Debts of  
record.

A DEBT of record is a sum of money which appears to be due by the evidence of a Court of record; as where a specific sum is adjudged to be due to the plaintiff (b).  
**1334.**

Specialty  
debts.

Debts by specialty or special contract are sums of money becoming due by deed or instrument under seal: as by a deed of covenant, by a lease reserving rent, or by bond or obligation (c). **1335.**

(a) [It may be noticed in this place that there is an ad valorem duty payable in respect of probates and letters of administration, as to which see Wms. Exors., 8th ed. (1879), also the Customs and Inland Revenue Acts, 1880 and 1881.] And by the Succession Duty Act, 16 & 17 Vict. c. 51, real property is now made liable to a succession duty (s. 2), payable by eight half-yearly instalments (s. 21): and for the purpose of succession duty, leaseholds are to be considered as real estate (s. 1). And succession duty is now payable on all interests in personal estate, even though

created by deed (s. 2). The duty arises on a succession upon the death of any person dying after the 19th of May, 1853, even though under a deed or will executed before that time (ss. 2, 54). And it is to be a first charge on the interest of the successor (s. 42). See Archbold's Succession Duty Act; Shelford's Probate, Legacy, and Succession Duty Act; Thring's Succession Duty Act: [the Customs and Inland Revenue Acts, 1880 and 1881.]

(b) 2 Bl. Com. 464.

(c) 2 Bl. Com. 465: *Marryat v. Marryat*, 28 Beav. 224, and cases



Debts by simple contract are those where the contract is neither ascertained by matter of record, nor by deed or special instrument, but by mere oral evidence or notes unsealed (a). 1336.

Pr. III. T. 1,  
Ch. 3, s. 1.

Simple  
contract  
debt.

A mortgage is a debt by specialty, if secured by bond or covenant, although the money so secured be not actually paid to the mortgagor. But without a bond or covenant, it seems the debt is a debt by simple contract (b). 1337.

Mortgage  
debts.

Under the Statute of Limitations, 21 Jac. 1, c. 16, s. 3, actions upon simple contract, whether in the form of debt or assumpsit, must be brought within six years after the cause of action arose, except that by s. 7, as altered by the stat. 19 & 20 Vict. c. 97, ss. 9, 10, 12, if any person entitled to sue is at the time when such cause of action arises under age, or under coverture, or non compos mentis, then such action may be brought within six years from the time when such person shall become of age, or discover, or sane. And by the stat. 4 & 5 Anne c. 16, s. 19, a similar extension of the time is given where any person liable to be sued is beyond seas at the time when the cause of action accrued. But when once the period of limitation under a Statute of Limitations begins to run, nothing that happens afterwards will stop it (c). The Statute of Limitations, 21 Jac. 1, c. 16, does not apply to demands where a fiduciary relation exists between the parties, whether as express trustee and cestui que trust, or as principal and agent (d). And the protection of the statute is removed if the defendant has

Statutes of  
Limitation.

there cited; *Saunders v. Milsome*, L. R. 2 Eq. 573; *Kidd v. Boone*, L. R. 12 Eq. 89; *In re Dickson*, *Blackburn v. Dickson*, L. R. 12 Eq. 154. See stat. 32 & 33 Vict. c. 46, for abolishing the distinction, as to priority of payment, between specialty and simple contract debts, *infra*, par. 1368.

(a) 2 Bl. Com. 465.

(b) *Coote Mortg.*, 3rd ed. 452; *Isaacson v. Harwood*, L. R. 3 Ch. Ap. 225.

(c) *Smith on Contracts*, 3rd ed. 434—7, 452; 3 *Steph. Com.*, 4th ed. 546—7.

(d) *Obee v. Bishop*, 1 D. F. & J. 142; *Brittlebank v. Goodwin*, L. R. 5 Eq. 545; *Burdick v. Garrick*, L. R. 5 Ch. Ap. 233.

Pr. III. T. 1.  
Ch. 3, s. 1.

given an acknowledgment in writing, signed in such terms as not to preclude the Court from inferring a promise to pay (a). A part payment of principal or interest also takes the case out of the statute (b). **1338.**

Under the stat. 3 & 4 Will. 4, c. 42, as altered by the stat. 19 & 20 Vict. c. 97, s. 10, the statutable time of limitation in actions on specialty is twenty years from the time of accrual of the cause of action or suit, or from the removal of the disability of infancy, coverture, or insanity of the party entitled to such action or suit; or from the return of the defendant, if abroad; or from the date of an acknowledgment of the debt in writing, signed by the defendant or his agent; or from a part payment of principal or interest (c). **1339.**

Effects of a  
provision for  
payment of  
debts.

Debts actually barred by the Statute of Limitations, or by laches independently of the statute, are not included in a trust for payment of debts. But where a provision is made, either by will or by deed, for payment of debts out of real estate, the statutory time will cease to run, in the former case, from the death of the testator, in the latter, from the date of the deed; because the creditor, cestui que trust, is not to be barred by the neglect of the trustee to do his duty. The same principle will apply where personal estate only is assigned in trust for payment of debts. But where the like trust is expressly created by will, it does not prevent the running of the statute; because the trust for payment of debts, with which every executor is clothed by law, has no such effect. Indeed, such an express trust is inoperative (d). **1340.**

Damages for

Damages under a breach, after the death of the cove-

(a) Smith on Contracts, 3rd ed. 439—445.

(b) Smith on Contracts, 3rd ed. 447.

(c) Smith on Contracts, 3rd ed. 425—434; 3 Steph. Com., 4th ed.

549, 550.

(d) 2 Spence's Eq. Jur. 357; 6 Cruise T. 38, c. 16, § 17; 2 Jarm. Wills, 2nd ed. 524; *Harcourt v. White*, 28 Beav. 303.

nantor, of a covenant for quiet enjoyment, are a debt within a trust to pay all the debts which he should owe at his death (a). 1341.

Pr. III. T. 1,  
Ch. 3, s. 1.

—  
breach of  
covenant  
within a  
trust to pay  
debts.

Trust to pay  
bond debts.

If a trust is to pay bond debts, with the interest due or to become due on the bonds up to the day of payment, a bond creditor will not be entitled to receive more interest than, with the principal, will be covered by the penalty of the bond; although it is otherwise if the trust is for the payment of the sum secured by the bond, with interest on that sum (b). But this rule, that interest shall not exceed the penalty, does not apply in case the bond debt is also secured by a mortgage, even though the mortgage is given by a surety, and subsequently to the bond; unless the mortgage is made a security only for the bond debt and the interest "to become due on the bond" (c). 1342.

A stranger who buys up a first charge at less than the full amount, is entitled to the full amount, as against a second incumbrancer. And if the owner of the reversion, not having created the first or second charge, does such an act, he is in the same position as a stranger (d). But if an agent, trustee, heir, or executor of the owner of the estate buys up an incumbrance, he is only entitled to so much as he gave for it, unless the purchase is made to protect a subsequent incumbrance to which he is entitled in his own right (e). 1343.

Buying up  
a charge.

Interest may be demanded, not only where there is an express stipulation for it, written or verbal, but also where it is payable by the usage of trade or of the parties, or in the case of an overdue bond, bill, or promissory note, or an

Interest.

(a) Sugd. Concise View, 473; 2 537—8; *Davis v. Barrett*, 14 Beav. Jarm. Wills, 2nd ed. 497, n. (k). 542.

(b) Coote Mortg., 3rd ed. 436.

(c) Coote Mortg., 3rd ed. 443.

(d) Sugd. Concise View, 412, 8; *Hobday v. Peters* (No. 1), 28 413; Coote Mortg., 3rd ed. 303. Beav. 349.

(e) Sugd. Concise View, 412—13; Coote Mortg., 3rd ed. 303. 537—

Pr. III. T. 1,  
Ch. 3, s. 1.

account stated for money lent, or on money compelled to be paid by a surety. And the jury may allow interest to the creditor, on any debt or sum certain, from the time when the sum was payable, if payable from a time certain under a written instrument, or if payable otherwise, from the time of a written demand, with notice that interest would be claimed. Interest at 4 per cent. is payable on a judgment debt (a). **1344.**

Where a security for money payable on a certain day stipulates for the allowance of a certain rate of interest up to that day, interest at the same rate is not implied afterwards. Interest by way of damages for the non-payment of the debt on the day fixed may be given by the Court or jury, when the creditor or his estate has not been the cause of the delay in payment, and it would be just that interest should be paid; and as a rule the interest stipulated to be paid up to the day fixed for the payment of the debt, where it is reasonable and usual, may well be adopted, as the amount of such damages for the detention of the debt (b). **1345.**

In the absence of express enactment or contract, 5 per cent. is usually allowed. **1346.**

Where a woman marries her creditor or debtor, the debt is thereby absolutely extinguished (c). **1347.**

Where a creditor forgives or bequeaths a debt due to him by a legatee, as one of two or more joint debtors, as, for instance, where the obligee bequeaths the sum due to him by one of two joint obligors of a bond, it is not a release to the other of the two obligors, but is only a per-

Extinction  
of debt by  
marrying a  
debtor or  
creditor.

Bequest of  
sum due  
from one  
joint debtor  
does not  
extinguish  
the joint  
debt.

(a) Sm. Merc. Law, 545—7; c. 110, s. 17.

Trower 78, 295—7, 304; Rosc. 416—417; Byles 283—4; Chit. B. 433—7; Chit. Con., 9th ed. 600—4; Ad. Con., 6th ed. 1063; 3 & 4 Vict. c. 42, s. 28; 1 & 2 Vict.

(b) *Cook v. Fowler*, L. R. 7 H. L. 27.

(c) 9 Jarm. & Byth. by Sweet 796.

sonal legacy to him whose debt is so forgiven, and will lapse by the death of the legatee in the testator's lifetime so that his personal representatives will still be liable (a).  
1348.

Pr. III. T. 1,  
Ch. 3, s. 1.

## II. *Crown Debts.*

By the stat. 33 Hen. 8, c. 39, s. 50, all bonds relating to the revenue are to be made to the King himself in a prescribed form ; and being so made, are to have the effect of statutes staple. And by stat. 13 Eliz. c. 4, all lands, tenements, profits, commodities, and hereditaments, which any of the treasurers, receivers, tellers, customers, collectors, farmers, officers, and accountants there enumerated shall have within the time whilst he shall remain accountable, shall be liable to and shall be put and had in execution for the payment of his arrearages, in like manner as if he had the day he first became officer or accountant stood bound by writing obligatory, having the effect of a statute staple, for the payment of the same. But by sect. 10, those persons are excepted whose yearly receipt or whose whole receipt shall not exceed 300*l.* (b). 1349.

Bonds relating to the revenue.

Liability of hereditaments of accountants to the Crown and their sureties.

Where a person who is an accountant to the Crown sells his lands to a bonâ fide purchaser without notice, and afterwards becomes indebted to the Crown in his situation of accountant, his lands may be seized by the Crown in the hands of the purchaser, in consequence of the stat. 13 Eliz. c. 4 (c). The same holds with respect to the debts of a person who has executed a bond to the Crown to account for the money coming to his hands as a receiver ; as in the case of all receivers of land tax. And generally speaking, the same observation applies equally to the

(a) 2 Rep. Leg. by White, 1069.

(b) Burton, § 871, 872 ; Coote Mortg., 3rd ed. 86.

(c) 1 Cruise T. 1, § 69, 70 ; 4

Cruise T. 32, c. 36, § 61 ; 1 Jarm. & Byth. by Sweet, 112 ; Sugd. Concise View, 401—2 ; Co. Litt. 209 a, n. 1.

Pr. III. T. 1.  
Ch. 3, s. 1.

sureties for the debtor to the Crown, as to the debtor himself (a). 1350.

Registration  
of obliga-  
tions to the  
Crown.

By the stat. 2 Vict. c. 11, s. 8, no judgment, statute, or recognisance, on account of the Crown, or any inquisition by which any debt shall be found due to the Crown, or any obligation or specialty to the Crown under the stat. 33 Hen. 8, c. 39, or any acceptance of office whereby lands shall become liable for the payment of arrearages under the stat. 13 Eliz. c. 4, shall affect purchasers or mortgagees unless and until registered :—"No judgment, statute, or recognisance which shall hereafter be obtained or entered into in the name or upon the proper account of Her Majesty, her heirs or successors, or inquisition by which any debt shall be found due to Her Majesty, her heirs or successors, or obligation or specialty which shall hereafter be made to Her Majesty, her heirs or successors, in the manner directed by an Act passed in the thirty-third year of the reign of his late Majesty King Henry the Eighth, intituled 'The erection of the Court of Surveyors of the King's lands, and the names of the officers there, and their authority,' or any acceptance of office which shall hereafter be accepted by officers whose lands shall thereby become liable for the payment and satisfaction of arrearages under the provisions of the Act passed in the thirteenth year of the reign of her late Majesty Queen Elizabeth, intituled 'An Act to make the lands, tenements, goods, and chattels of tellers, receivers, et cætera, liable to the payment of their debts,' shall affect any lands, tenements, or hereditaments, as to purchasers or mortgagees, unless and until a memorandum or minute, containing the name and the usual or last place of abode, and the title, trade, or profession of the person whose estate is intended to be affected thereby, and also in the case of any judgment the Court

(a) Sugd. Concise View, 401—2; Co. Litt. 209 a, n. 1.

and the title of the cause in which such judgment shall have been obtained, and the date of such judgment, and the amount of the debt, damages, and costs thereby recovered, and also in the case of a statute or recognisance the sum for which the same was acknowledged, and before whom the same was acknowledged, and the date of the same, and also in the case of an inquisition the sum thereby found to be due, and the date of the same, and also in the case of an obligation or specialty the sum in which the obligee shall be bound, or for which the obligation or specialty shall be made, and the date of the same, and also in the case of acceptance of office the name of the office, and the time of the officer accepting the same, shall be left with the senior Master of the said Court of Common Pleas, who shall forthwith enter the same particulars in a book, to be intituled 'The Index to Debtors and Accountants to the Crown,' in alphabetical order by the name of the person whose estate is intended to be affected by such judgment, statute, or recognisance, inquisition, obligation, or specialty, or the acceptance of any office." 1351.

Pr. III. T. 1.  
Ch. 3, s. 1.

By the stat. 22 & 23 Vict. c. 35, s. 22, the provisions as to re-registry of judgments, etc., are extended to judgments, statutes, recognisances, inquisitions, obligations, and specialties, in favour of the Crown :—"From and after the thirty-first day of December one thousand eight hundred and fifty-nine, the provision for re-registry of judgments, decrees or orders, rules or orders, contained in the Act of the session of the second and third years of Queen Victoria, chapter eleven, as explained and amended by the Act of the session of the eighteenth and nineteenth years of Queen Victoria, chapter fifteen, shall extend and apply to every such judgment, statute, recognisance, inquisition, obligation, specialty, or acceptance of office as is by section eight of the first-mentioned Act required to be registered, so that it shall be obligatory on the Crown, in order to bind the

Re-registra-  
tion.

Pr. III. T. 1.  
Ch. 8, s. 1.

lands, tenements, or hereditaments of its debtors or accountants, as against purchasers, mortgagees, or creditors becoming such after the thirty-first day of December one thousand eight hundred and fifty-nine, to re-register, in like manner, as it is obligatory on a private person, and so that notice of any such judgment, statute, recognisance, inquisition, obligation, specialty, or acceptance of office, not duly re-registered, shall not avail against purchasers, mortgagees, or creditors, becoming such after the thirty-first day of December one thousand eight hundred and fifty-nine, as to lands, tenements, or hereditaments; and this provision shall apply to every such judgment, statute, recognisance, inquisition, obligation, specialty, or acceptance of office, as since the passing of the first-mentioned Act has been registered under the provisions therein contained, or as shall hereafter be so registered: this section shall not extend to Ireland." 1352.

Alienation  
before  
acceptance  
of office.

An alienation *bonâ fide* prior to the acceptance of an office which renders the person accepting it an accountant of the Crown, is good against the Crown (*a*). 1353.

Who are  
accountants  
to the  
Crown.

Persons holding, under the Crown, offices which were in existence at the time of the stat. 13 Eliz. c. 4, are accountants within the meaning of that statute (*b*). A parish collector of taxes, although he is liable to the process of the Crown in respect of the money which he has received as such collector, is not that kind of debtor to the Crown, that his lands would be bound so as to affect the existing equitable or legal interest of any third person in them. And the Crown has no right to his estates until he becomes a debtor by record, when an inquisition is taken (*c*). 1354.

Discharge  
of Crown  
debts.

Formerly, the only discharge of a debt to the Crown was an acquittance from the officers of the Exchequer, called a *quietus* (*d*). And it is enacted by the stat. 2 Vict.

(*a*) 4 Cruise T. 32, c. 26, § 63.

(*b*) 1 Jarm. & Byth. by Sweet, 112.

(*c*) Sugd. Concise View, 403—4.

(*d*) 1 Cruise T. 1, § 69, 70.



c. 11, s. 9, that "whenever a quietus shall be obtained by a debtor or accountant to the Crown, and an office copy thereof shall be left with the senior Master of the said Court of Common Pleas, together with a certificate, signed by the accountant-general, that the same may be registered, the said Master shall forthwith enter the same in the said book of debtors and accountants to the Crown in alphabetical order, by the name of the person whose estate is intended to be discharged by such quietus, with the date." 1355.

Pr. III. T. 1.  
Ch. 3, s. 1.

Quietus to  
debtors or  
accountants  
to the  
Crown to be  
registered.

But by s. 10, after reciting that it is expedient to make further provision for the discharge of an estate belonging to a debtor or accountant to the Crown from the claim of the Crown in the hands of a purchaser or mortgagee, although the debt or liability shall be not fully discharged, it is enacted that "it shall be lawful for the Commissioners of Her Majesty's Treasury of the United Kingdom of Great Britain and Ireland for the time being, or any three of them, by writing under their hands, upon payment of such sums of money as they may think fit to require into the receipt of Her Majesty's Exchequer, to be applied in liquidation of the debt or liability of any debtor or accountant to the Crown, or upon such other terms as they may think proper, to certify that any lands, tenements, or hereditaments of any such Crown debtor or accountant shall be held by the purchaser or mortgagee, or intended purchaser or mortgagee thereof, his or their heirs, executors, administrators, and assigns, wholly exonerated and discharged from all further claims of Her Majesty, her heirs or successors, for or in respect of any debt, claim, or liability, present or future, of the debtor or accountant to whom such lands, tenements, or hereditaments belonged, or, in cases of leases for fines, to certify that the lessees, their heirs, executors, administrators, and assigns, shall hold so exonerated and discharged, without prejudice to

Certificate  
of discharge  
of the  
estates of  
debtors or  
accountants  
to the  
Crown.

Pr. III. T. 1.  
CH. 3, s. 1.

the rights and remedies of the Crown against the reversion of the lands, tenements, or hereditaments comprised in any such leases, and the rents and covenants reserved and contained by and in the same; and thereupon the same lands, tenements, or hereditaments shall respectively be held accordingly wholly exonerated and discharged as aforesaid, but in the cases of leases without prejudice as aforesaid." **1356.**

The certificate of two Lords of the Treasury is now sufficient. For by the stat. 12 & 13 Vict. c. 89, where any act whatsoever is, by statute or otherwise, required to be done by or under the hands of the Commissioners of the Treasury, or any three or more of them, every such act may be done by or under the hands of any two or more of them. **1357.**

Discharge  
of part of  
the estate  
of a debtor  
or account-  
ant to the  
Crown not  
to affect  
claim of the  
Crown on  
other lands  
liable.

By s. 11 of the statute 2 Vict. c. 11, "any such certificate, or the discharge of any such lands, tenements, or other hereditaments by virtue of this Act, shall in nowise impeach, lessen, or affect the right or power of Her Majesty, her heirs or successors, to levy the whole of any debt or demand which may at any time be due from any such debtor or accountant to the Crown out of or from any other lands, tenements, or hereditaments which would have been liable thereto in case no such certificate had been granted and no such discharge had been obtained." **1358.**

16 & 17 Vict.  
c. 107, ss. 196  
—7, as to  
entering up  
satisfaction  
on record of  
obligations  
to the  
Crown.

By the stat. 16 & 17 Vict. c. 107, s. 196, "If any bond given under the provisions of this or any Act relating to the customs, or in respect of any matter under the control or management of the Commissioners of Customs, shall have been registered in the Court of Common Pleas in England, or in the office of the Registrar of Judgments in Ireland, and the condition of such bond shall have been satisfied, the Commissioners of Customs, by certificate under the hands of any two or more of them, may

authorise the proper officer of the said Court or Office of Registrar of Judgments, as the case may be, to enter up satisfaction on the record of such bond or obligation," etc. **1359.**

Pr. III. T. 1,  
Ch. 3, s. 1.

By s. 197, "When any bond entered into under the provisions of this or any Act relating to the customs, or for the performance of any condition, order, or matter incident or relative to the customs, shall have been registered in the Court of Common Pleas in England, under the Act of 2 Vict. c. 11, or in the Office of the Registrar of Judgments in Ireland, under the Act of 7 & 8 Vict. c. 90, and it shall be deemed necessary, in the discretion of the Commissioners of Customs, to exonerate the whole or any part of the lands of any obligor of such bond from liability in respect thereof, the Commissioners of Customs, by certificate or certificates under the hands of any two or more of them, may, first requiring the consent of any co-obligor, if they shall deem it necessary, exonerate and discharge such lands or any part thereof, as the case may require," etc. **1360.**

and as to  
exoneration  
of estates of  
obligors.

By the stat. 23 & 24 Vict. c. 115, s. 1, all these provisions "shall, *mutatis mutandis*, be deemed to extend and shall be applied to all bonds and other securities entered into or given to Her Majesty, her heirs or successors: Provided always, that in every case in which under the provisions of the said sections any certificate is required to be signed or any other matter authorised to be done by the Commissioners of Customs, or any number of them, any such certificate or matter in relation to any bond or other security concerning or incident to any public department shall respectively be signed and done by the respective commissioners or other principal officers of such department, or any two of them respectively, or if there shall be only one such commissioner or principal officer, then by him, as the case may be, or if there shall

These  
provisions  
extended to  
all bonds to  
the Crown.

Pr. III. T. 1, be no such commissioner or other principal officer, then  
 Ch. 3, s. 1. by the Commissioners of Her Majesty's Treasury or any  
 two of them." 1361.

### III. *Liability of Estates in Fee and Estates for Years to Payment of Debts.*

Liability of  
 terms for  
 years to  
 payment  
 of simple  
 contract  
 debts.

Estates for years being chattel interests and vesting in executors or administrators, have always been subject to the payment of simple contract debts, and are also liable to be sold by execution for the payment of debts due by judgment (a). 1362.

Liability of  
 real estate  
 to payment  
 of debts, at  
 common  
 law.

By the common law, real estate was not in general liable to simple contract debts, unless made so by deed or will executed by the owner (b). Real estate of freehold tenure was, however, liable to the payment of debts due to the Crown (c), debts on record, and specialty debts arising under deeds in which the debtor has expressly bound himself and his heirs (d). Copyholds were not liable to the payment of debts even of record, nor of debts due to the Crown; because, if a creditor were allowed to take possession of a copyhold estate, it would be prejudicial to the lord. And where a copyholder in fee simple died, his estate was not assets in the hands of his heir, as freehold lands were, for payment of specialty debts. But a copyhold might be charged by will with debts (e). 1363.

Statute of  
 Fraudulent  
 Devises.

By the statute of Fraudulent Devises, 3 W. & M. c. 14, it is enacted (s. 2) that all wills and tenements shall be deemed and taken, only as against a creditor or creditors by bond or other specialty in which the heirs are bound,

(a) 1 Cruise T. 8, c. 2, § 19.

(b) 1 Cruise T. 1, § 55; 6 Cruise  
 T. 38, c. 16, § 7, 8.

(c) 1 Cruise T. 1, § 60.

(d) 1 Cruise T. 1, § 53; 1 Steph.  
 Com. 4th ed. 426; Trower on Dr. &  
 Cr. 285.

(e) 1 Cruise T. 10, c. 3, § 21.

their heirs, executors, administrators, and assigns, to be fraudulent and utterly void, with an exception (s. 4) of devises for payment of debts or children's portions, pursuant to a marriage agreement (a). 1364.

Pr. III. T. 1.  
Ch. 3, s. 1.

By 11 Geo. 4 & 1 Will. 4, c. 47 (which repeals 3 W. & M. c. 14, and 6 & 7 Will. 3, c. 14, and 4 Anne c. 5 (I.), and 47 Geo. 3, c. 74) (b), wills shall be deemed void as against persons or bodies politic or corporate, and their heirs, successors, executors, administrators, and assigns, with whom the testators have entered into any bond, covenant, or other specialty binding their heirs (c). And although the heirs or devisees may have sold the estate, creditors may maintain actions against such heirs and devisees or the devisees of such first-mentioned devisees jointly (d), or, if there shall not be any heir, against such devisees solely (e). But any disposition for the payment of any just debt or portion, in pursuance of any agreement in writing, bonâ fide made before marriage, shall be in full force (f). 1365.

Devises  
made void  
as against  
covenantors  
or obligees,  
etc., of  
devisor.

By 3 & 4 Will. 4, c. 104, real estate, whether freehold, customaryhold, or copyhold, not charged with or devised subject to the payment of debts, shall be assets to be administered in equity for the payment of simple contract as well as specialty debts; but the priority of creditors by specialty in which the heirs are bound is preserved. The words are these:—"When any person shall die seised of or entitled to any estate or interest in lands, tenements, or hereditaments, corporeal or incorporeal, or other real estate, whether freehold, customaryhold, or copyhold, which he shall not by his last will have charged with or devised subject to the payment of his debts, the same shall be assets to be administered in Courts of Equity for the pay-

Enactments  
as to liability  
of real estate  
to simple  
contract  
debts, as  
well as to  
specialty  
debts.

(a) 6 Cruise T. 38, c. 1, § 20. See  
*Coope v. Creswell*, L. R. 2 Ch. Ap.  
112.

(b) See sect. 1.

(c) See sect. 2.

(d) See sects. 3, 6, 8.

(e) See sect. 4.

(f) See sect. 5.

Pr. III. T. 1,  
Ch. 3, s. 1.

ment of the just debts of such persons, as well debts due on simple contracts as on specialty ; and the heir or heirs at law, customary heir or heirs, devisee or devisees of such debtor, shall be liable to all the same suits in equity at the suit of any of the creditors of such debtor, whether creditors by simple contract or by specialty, as the heir or heirs at law, devisee or devisees of any person or persons who died seised of freehold estates was or were before the passing of this Act liable to in respect of such freehold estates at the suit of creditors by specialty in which the heirs were bound : Provided always, that in the administrations of assets by Courts of Equity under and by virtue of this Act all creditors by specialty in which the heirs are bound shall be paid the full amount of the debts due to them before any of the creditors by simple contract or by specialty in which the heirs are not bound shall be paid any part of their demands" (a). 1366.

It was not the object, nor is it the operation, of this statute to make the simple contract debts of a deceased person a specific charge on his real estate. But it does make them a general charge thereon in equity : so that the heir or devisee takes no beneficial interest therein, except subject to and after payment of those debts ; and hence judgments entered up against the heir for his own debt, before any action or suit by the simple contract creditors of the ancestor, have no priority over those simple contract creditors, notwithstanding the stat. 1 & 2 Vict. c. 110, s. 13 (subject to the stat. 23 & 24 Vict. c. 38, s. 1, and 27 & 28 Vict. c. 112, s. 1), constitutes a judgment a charge on any lands of which the judgment debtor is seised or over which he has any disposing power (b). 1367.

Stat. 32 & 33  
Vict. c. 46.

By the stat. 32 & 33 Vict. c. 46, after reciting that "it is

(a) See also 1 Will. 4, c. 47, s. 9,  
as to traders' assets.

(b) *Kinderley v. Jervis*, 22 Beav.  
1.

expedient to abolish the distinction as to priority of payment between specialty and simple contract debts of deceased persons," it is enacted as follows: "In the administration of the estate of every person who shall die on or after the 1st day of January, 1870, no debt or liability of such person shall be entitled to any priority or preference by reason merely that the same is secured by or arises under a bond, deed, or other instrument under seal, or is otherwise made or constituted a specialty debt; but all the creditors of such person, as well specialty as simple contract, shall be treated as standing in equal degree, and be paid accordingly out of the assets of such deceased person, whether such assets are legal or equitable, any statute or other law to the contrary notwithstanding: Provided always, that this act shall not prejudice or affect any lien, charge, or other security which any creditor may hold or be entitled to for the payment of his debt" (a). 1368.

Pr. III. T. 1,  
Ch. 3, s. 1.

Notwithstanding this statute, a judgment by a simple contract creditor against an executor or administrator has priority in the administration of assets over other simple contract creditors (b). 1369.

By the stat. 11 Geo. 4 & 1 Will. 4, c. 47, s. 11, it is enacted, "that where any suit hath been or shall be instituted in any Court of Equity, for the payment of any debts of any person or persons deceased, to which their heir or heirs, devisee or devisees may be subject or liable, and such Court of Equity shall decree the estates liable to such debts, or any of them, to be sold for satisfaction of such debt or debts, and by reason of the infancy of any such heir or heirs, devisee or devisees, an immediate conveyance thereof cannot, as the law at present stands, be compelled, in every such case such Court shall direct, and if necessary, compel such infant or infants to convey such

Conveyances by  
infant heirs  
or devisees  
under decree  
for sale for  
payment of  
debts.

(a) *In re Hastings, Shirreff v. Hastings*, L. R. 6 Ch. D. 610.

(b) *In re Williams' Estate*, L. R. 15 Eq. 270.

Pr. III. T. 1.  
Ch. 3, s. 1.

Convey-  
ances by  
persons  
having a  
limited  
interest by  
devise, or by  
executory  
devises,  
under a  
decree for  
sale for  
payment of  
debts.

estates so to be sold (by all proper assurances in the law) to the purchaser or purchasers thereof, and in such manner as the said Court shall think proper and direct ; and every such infant shall make such conveyance accordingly ; and every such conveyance shall be as valid and effectual to all intents and purposes as if such person or persons, being an infant or infants, was or were at the time of executing the same of the full age of twenty-one years." And by s. 12, "where any lands, tenements, or hereditaments have been or shall be devised in settlement by any person or persons whose estate under this Act, or by law, or by his or their will or wills, shall be liable to the payment of any of his or their debts, and by such devise shall be vested in any person or persons for life or other limited interest, with any remainder, limitation, or gift over, which may not be vested, or may be vested in some person or persons, from whom a conveyance or other assurance of the same cannot be obtained, or by way of executory devise, and a decree shall be made for the sale thereof for the payment of such debts or any of them, it shall be lawful for the Court by whom such decree shall be made to direct any such tenant for life, or other person having a limited interest, or the first executory devisee thereof, to convey, release, assign, surrender, or otherwise assure the fee simple or other the whole interest or interests so to be sold, to the purchaser or purchasers, or in such manner as the said Court shall think proper ; and every such conveyance, release, surrender, assignment, or other assurance shall be as effectual as if the person who shall make and execute the same were seised or possessed of the fee simple or other the whole estate so to be sold." 1370.

Mortgages  
and sales by  
infant heirs  
and de-  
vises, and  
by persons  
having  
limited

By the stat. 2 & 3 Vict. c. 60, after reciting ss. 11 and 12 of the stat. 11 Geo. 4 & 1 Will. 4, c. 47, it is enacted, "that the said hereinbefore recited provisions of the said Act shall extend and the same are hereby extended to



authorise Courts of Equity to direct mortgages as well as sales to be made of the estates of such infant heirs or devisees, and also of lands, tenements, or hereditaments so devised in settlement as aforesaid, and to authorise such sales and mortgages to be made in cases where such tenant for life or other person having a limited interest, or such first executory devisee as aforesaid, is an infant." And by s. 2, "when any sale or mortgage shall be made in pursuance of the said recited Act or this Act, the surplus (if any) of the money raised by such sale or mortgage, which shall remain after answering the purposes for which the same shall have been raised, and defraying all reasonable costs and expenses, shall be considered in all respects of the same nature, and descend or devolve in the same manner, as the estate, or the lands, tenements, or hereditaments so sold or mortgaged, and shall belong to the same persons, be subject to the same limitations and provisions, and be applicable to the same purposes, as such estate or such lands, tenements, or hereditaments would have belonged and been subject and applicable to in case no such sale or mortgage had been made." 1371.

By the stat. 11 & 12 Vict. c. 87, after reciting s. 12 of the stat. 11 Geo. 4 & 1 Will. 4, c. 47, it is enacted, "in cases in other respects falling within the said hereinbefore recited provisions of the said Act, that the said hereinbefore recited provision of the said Act shall extend and is hereby extended to any case in which any lands, tenements, or hereditaments of any deceased person shall by descent or otherwise than by devise be vested in the heir or co-heirs of such persons, subject to an executory devise over in favour of a person or persons not existing or not ascertained; and in any such case it shall be lawful for the Court mentioned in the said recited provision to direct such heir or co-heirs, notwithstanding such heir or such co-heirs, or any of them, may be an infant or infants, to

Pr. III. T. 1,  
Ch. 3, s. 1.

interests, or  
executory  
devisees,  
under  
decrees for  
payment of  
debts,  
though not  
of age.

Convey-  
ances under  
such  
decrees, by  
heirs,  
though  
under age,  
taking  
otherwise  
than by  
devise, but  
subject to  
an execu-  
tory devise  
over in  
favour of a  
person not  
in being, or  
not ascer-  
tained.

Pr. III. T. 1,  
Ch. 3, s. 1. convey, release, assign, surrender, or otherwise assure the fee simple or other the whole interest or interests so to be sold to the purchaser or purchasers, or in such manner as the said Court shall think proper ; and every such conveyance, release, surrender, assignment, or other assurance shall be as effectual as if the heir or co-heirs who shall make and execute the same was or were seised or possessed of the fee simple or other whole estate so to be sold, and, if an infant or infants, was or were of full age." 1372.

IV. *Liability of Persons having particular Estates to discharge Debts or keep down the Interest thereof.*

To what  
debts issue  
in tail are  
liable.

By the common law, the issue in tail are not subject to any of the debts or incumbrances of their ancestor (a). But under the stat. 33 Hen. 8, c. 39, s. 75, the issue in tail are subject to debts originally due to the Crown, by judgment, recognisance, obligation, or other specialty, unless before any process or extent the issue in tail *bonâ fide* alien the land (b). And under the stat. 1 & 2 Vict. c. 110, s. 13, a judgment may operate as a charge on real estate so as to bind the issue (c). 1373.

Proportion-  
ate liability  
of jointress  
and issue.

Where a jointress and the issue claim under the same settlement, they shall contribute proportionably in the discharge of any prior incumbrance on the estate (d). 1374.

Voluntary  
discharge of  
an incum-  
brance by a  
tenant in  
tail, or by a  
tenant for  
life.

If a tenant in tail in possession pays off an incumbrance on the estate, it will ordinarily be treated as extinguished, and the remainderman cannot be called upon for a contribution, unless the tenant in tail has kept alive the incumbrance by some suitable assignment, or has otherwise manifested his intention to hold himself out as a creditor of the estate in lieu of the mortgagee ; because a tenant in tail in possession can make himself absolute owner of

(a) 1 Cruise T. 2, c. 2, § 27.

(b) 1 Cruise T. 2, c. 2, § 28, 29.

(c) See *supra*, par. 1156.

(d) 1 Cruise T. 7, c. 1, § 39.

the estate; and, therefore, if he discharges incumbrances, he is presumed to do so in the character of owner, unless he clearly shows that he intends to become a creditor in respect of such discharge. But the like doctrine does not apply to a tenant in tail in remainder, whose estate may be altogether defeated, or to a tenant in tail in possession, subject to an executory devise over, or to a tenant for life; for, if either of these persons, and especially a tenant for life, pays off an incumbrance, it must be presumed that he means to keep it alive against the inheritance for his benefit. But, in either of these cases, the presumption may be rebutted by circumstances which demonstrate a contrary intention (a). And if a tenant for life pays off a bond debt, it will not be presumed that he meant to keep it alive (b). **1375.**

Fr. III. T. 1,  
Ch. 3, s. 1.

With respect to the compulsory discharge of incumbrances, the modern rule is this: that the tenant for life shall contribute, beyond the interest, in proportion to the benefit he derives from the liquidation of the debts, and the consequent cessation of interest, which of course will much depend on his age, and the computation of the value of his life. If the estate is sold to discharge incumbrances (as the incumbrancer may insist that it shall), the surplus which remains after discharging the incumbrances is to be applied as follows: the income thereof is to go to the tenant for life during his life; and then the whole capital is to be paid over to the remainderman or reversioner (c). **1376.**

Compulsory  
discharge of  
incum-  
brances.

A tenant for life is bound to keep down the interest of all incumbrances affecting the inheritance, even of those

Keeping  
down the  
interest on  
incum-  
brances.

(a) Story's Eq. Jur. § 486; 2 Spence's Eq. Jur. 308, 344, 345, 843; 1 Cruise T. 2, c. 1, § 40; and 1 Cruise T. 3, c. 1, § 27; Coote Mortg. 3rd ed. 395.

(b) *Morley v. Morley*, 5 D. M. & G. 610.

(c) Story's Eq. Jur. § 487; 2 Spence's Eq. Jur. 551, 841.

**Pr. III. T. 1,** which are anterior to the commencement of his estate, so  
**Ch. 3, s. 1.** far as the rents and profits extend (a). 1377.

Where a tenant for life of an estate, subject to a charge bearing interest, pays the interest, although the rents and profits are insufficient for that purpose, he cannot make himself an incumbrancer on the estate for the excess in his payments, if he has not given to the remainderman any intimation of the insufficiency of the rents and profits, and of his intention to charge the excess of his payments on the inheritance (b). 1378.

Even in the case of an infant tenant in fee, the guardian is bound to keep down the interest of incumbrances out of the rents, so as not to increase the personal estate at the expense of the real estate (c). But the debt itself is placed upon the corpus of the estate, even though it be by simple contract, and therefore carry no interest. If, however, the property is of a perishable nature or limited in point of duration, then such an arrangement is considered unfair upon the remainderman (d). 1379.

A tenant in tail in possession, if of full age, cannot be compelled by the remainderman or reversioner to pay the interest; because he can make himself absolute owner of the estate. But if such a tenant in tail does pay the interest, his personal representatives have no right to be allowed the sum so paid, as a charge on the estate; because he is supposed to have kept down the interest, as owner, for the benefit of the estate (e). If a tenant in tail is an infant, his guardian or trustee will be required to keep down the interest; because the infant cannot, of his own free will, bar the remainder or reversion (f). 1380.

(a) 1 Cruise T. 3, c. 1, § 28; 1 Cruise T. 5, c. 2, § 29.

(b) *Lord Kensington v. Bouverie*, 7 H. L. Cas. 557.

(c) Coote Mortg. 3rd ed. 439.

(d) Coote Mortg. 3rd ed. 439.

(e) Story's Eq. Jur. § 488, 1028 a; 2 Spence's Eq. Jur. 551; 1 Cruise T. 3, c. 1, § 28; 1 Cruise T. 5, c. 2, § 29; Coote Mortg. 3rd ed. 439.

(f) Story's Eq. Jur. § 488 n; Coote Mortg. 3rd ed. 439.

## SECTION II.

*Of Assets, and the Administration thereof.*I. *Legal and Equitable Assets.*

Assets, that is, property available for the payment of debts, of a deceased person, are divided into legal and equitable. Legal assets are property which creditors may make available at law, for the payment of debts, as having devolved upon or been recoverable by the executor or administrator, as such, for that purpose, simply by virtue of his office, even though the property may be of an equitable nature, and he has consequently been obliged to resort to equity to vest it in himself. Equitable assets are property which creditors can only make available in equity, for payment of debts, simply by virtue of an express disposition of the property which must be carried into effect in equity. Hence it has been held that an equity of redemption of an equitable interest in a sum of money charged on land is legal assets. So that it is not the legal or equitable nature of the property, nor the remedy of the executor, but the remedy of the creditor which determines whether the assets are legal or equitable (a). 1381.

Pr. III. T. 1,  
Ch. 3, s. 2.Division of  
assets.Definition of  
legal assets.Definition of  
equitable  
assets.

Equitable assets include real property which the deceased had by will charged with or devised for payment of his debts, although liable for payment of them by Act of Parliament (b). 1382.

Before the Statute of Frauds, all trust estates were equitable assets. By that statute a trust estate of inheritance became legal assets (c). 1383.

(a) See 2 Bl. Com. 244; Burton, *French*, ib. 716; *Mutlow v. Mutlow*, § 734; Story's Eq. Jur. § 551, 552; 4 D. & J. 539.  
2 Spence's Eq. Jur. 314, 315; *Cook* (b) Story's Eq. Jur. § 552 a.  
*v. Gregson*, 3 Drewry 547; *Shee v.* (c) Coote Mortg. 3rd ed. 32.

Pr. III. T. 1.  
Ch. 3, s. 2.

Administra-  
tion of legal  
assets.

Administra-  
tion of  
equitable  
assets.

Abatement  
of debts,  
and legacies.

Equity follows the same rules in regard to legal assets which are adopted at law, and gives the same priority to different classes of creditors which is enjoyed at law. And equity recognises and enforces all antecedent liens, claims, and charges in rem, according to their priority, whether those charges are of a legal or an equitable nature, and whether the assets are legal or equitable (a). But equitable assets, with the exception above mentioned, are distributed *pari passu* among all the creditors, where the equities are equal in all other respects without regard to the priority or dignity of the debts; and after they are satisfied, among all the legatees or distributees. But if the fund is insufficient to pay all the debts, all the creditors must abate in proportion. And so if the fund, after payment of debts, is insufficient to pay all the legacies, they must all abate in proportion, unless some priority is specifically given by the testator to some legacies over others (b). And charitable legacies now abate, as well as legacies of another kind (c). But as between specific and pecuniary legatees, it used to be considered that the loss should fall wholly on the latter (d). But the recent decisions in note (e) below seem to support the contrary. 1384.

(a) Story's Eq. Jur. § 553.

(b) Story's Eq. Jur. § 554—557;  
2 Spence's Eq. Jur. 314; Coote  
Mortg. 3rd ed. 31.

(c) Story's Eq. Jur. § 1180.

(d) 2 Spence's Eq. Jur. 343.

(e) Coote Mortg. 3rd. ed 474;  
*Dady v. Hartridge*, 1 Dr. & Sm.  
236; *Barrell v. Ironmonger*, Id. 242;  
*Rotherham v. Rotherham*, 26 Beav.  
465; *Bethell v. Green*, 34 Beav. 302;  
*Hensman v. Fryer*, L. R. 2 Eq. 627;  
(V.-C. K.) *Brownson v. Lawrence*,  
L. R. 6 Eq. 1; *Powell v. Riley*, L. R.  
12 Eq. 175. But in *Hensman v.*

*Fryer*, L. R. 3 Ch. Ap. 420, Lord  
*Chelmsford*, C. (on appeal), held that  
a residuary devise remains specific  
in effect, notwithstanding the 24th  
sect. of the Wills Act, and that a  
general legatee and a residuary  
devisee must contribute *pro rata*  
in payment of debts, which the  
property first applicable is insuffi-  
cient to satisfy. If this decision  
of Lord *Chelmsford* is right, the  
property numbered in par. 1385 as  
five, six, and seven, would be ap-  
plied rateably. But in *Dugdale v.*  
*Dugdale*, L. R. 14 Eq. 231, and

## II. *The Order of Administration of different Properties in the Payment of Debts and Legacies*

Except so far as the property numbered below as five, six, and seven, may be affected by the recent decisions referred to in the last paragraph, assets are now usually applied in payment of debts in the following order: First, the general personal estate is applied, except under the circumstances presently mentioned. Secondly, an estate particularly devised simply for the payment of debts. Thirdly, estates descended. Fourthly, property devised and bequeathed to particular devisees and legatees, but charged with the payment of debts (a). Fifthly, general legacies. Sixthly, lands comprised in a residuary devise. Seventhly, specific legacies and lands specifically devised (b). Eighthly, per-

Pr. III. T. 1,  
Ch. 3, s. 2.

Order of  
administra-  
tion of  
different  
properties  
in payment  
of debts  
and legacies.

in *Tomkins v. Colthurst*, 1 Ch. D. 626, the V.-C. *Malins* refused to follow this decision (so far as regards legatees) as clearly erroneous, and held that real estate devised and not charged with debts is *not* bound to contribute with a general legacy to meet the deficiency of the personal estate for payment of debts. See also *Farquharson v. Floyer*, L. R. 3 Ch. D. 109. In *Eddels v. Johnson*, 1 Gif. 22, *Pearmain v. Twiss*, 2 Gif. 130, and *Clark v. Clark*, 4 Gif. 702, the V.-C. *Stuart* had previously held that lands specifically devised and lands comprised in a residuary devise are to be applied rateably in payment of debts. And the V.-C. *Malins*, in *Gibbins v. Eyden*, L. R. 7 Eq. 371, decided the same way. And in *Lancefield v. Igoulden*, L. R. 10 Ch. Ap. 136 (reversing the decision of the V.-C. *Bacon*, 17 Eq. 556), Lord *Cairns*, L. C., and *James*, L. J., decided that the specific devisees *must* contribute rateably with

residuary devisees, and regarded the decision of Lord *Chelmsford* as having settled the question. See also *Jackson v. Pease*, L. R. 19 Eq. 96.

(a) Story's Eq. Jur. § 577; 2 Spence's Eq. Jur. 817, 822—824; Coote Mortg. 3rd ed. 472—4; 2 Jarm. Wills, 2nd ed. 526—7, 535; *Phillips v. Parry*, 22 Beav. 279; *Wood v. Ordish*, 3 Sm. & G. 125; *Scott v. Cumberland*, L. R. 18 Eq. 578. In *Stead v. Hardaker*, L. R. 15 Eq. 178, the V.-C. *Malins* is reported to have said, "It appears to me that the rule that descended estates are liable for the payment of debts in priority to the specifically devised estates is a very unreasonable rule." But in the opinion of the writer the rule is founded in the reason of things. For the specific devisee is expressly an object of the testator's regard; whereas the heir only takes by act of law.

(b) See note (c) on page 576.

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Ch. 3, s. 2.

sonalty and realty, over which the person whose estate is to be administered has exercised a general power of appointment (a). 1385.

Personal  
estate  
primarily  
applied,  
except,

A legacy or annuity given generally is payable out of personal estate only. And even when a legacy or annuity is given out of real and personal estate, or where debts are payable out of real as well as out of personal estate, it is the general rule that the personal estate is first to be applied, so far as it will extend. The personal estate constitutes the primary and natural fund for payment of debts and legacies (b), and will first be applied, except in these cases:— 1386.

1. In the  
case of  
express  
words or  
plain inten-  
tion to the  
contrary.

1. When there are express words (c) or a plain intention of the testator to exonerate his personal estate. And, to constitute such a plain intention, directions and expressions which do not necessarily imply more than that the real estate shall make good the deficiency, are not enough: there must appear upon the whole testamentary disposition, taken together, an intention so expressed as to convince a judicial mind that it was meant not merely to charge the real estate, but so to charge it as to exempt the personal estate (d). And (1) If the real estate is directed to be sold for payment of debts, and the personal estate is expressly bequeathed to legatees, then the personal estate will be exonerated by necessary implication. But neither of these circumstances, apart from the other and from cir-

(a) 2 Jarm. Wills, 2nd ed. 526, 528; Sugd. Pow. 8th ed. 474, 540; 2 Lead. Cas. Eq. 2nd ed. 102—4; Trower Dr. & Cr. 295; *Fleming v. Buchanan*, 3 D. M. & G. 976.

(b) 2 Spence's Eq. Jur. 344, 818; 1 Rep. Leg. by White, 671, 695; 2 Jarm. Wills, 2nd ed. 567; *Tench v. Chesse*, 6 D. M. & G. 453; *Bright v. Larcher* (No. 2), 4 D. & J. 608.

(c) *Young v. Young*, 26 Beav. 522.

(d) 2 Spence's Eq. Jur. 336—341, 824; Coote Mortg. 3rd ed. 454; 1 Rep. Leg. by White, 703, 710; 2 Jarm. Wills, 2nd ed. 546—8; *Plenty v. West*, 16 Beav. 180; *Ion v. Ashton*, 28 Beav. 379; *Coventry v. Coventry*, 2 Dr. & Sm. 470; *Forrest v. Prescott*, L. R. 10 Eq. 545.



cumstances affording similar implication of intention, is a sufficient indication of an intention to exonerate the personal estate. For it is most probable that a direction to sell real estate for the payment of debts, where no disposition is made of the personal estate, was intended to be followed only in the event of the personal estate proving insufficient for the purpose of paying the debts. And, on the other hand, it is most probable that a bequest of personal estate, not by way of specific legacy, where no provision is made for payment of debts out of the real estate, was made subject to the payment of debts out of such personal property (a). (2) Where the testator gives his personal estate as a whole, and not as a residue, by way of specific legacy to one who is not executor, and another fund is supplied for payment of debts, legacies, and funeral and testamentary expenses, the personal estate is exonerated (b). (3) Where a testator directs the conversion of his real and personal estate, and creates a mixed fund out of the produce, and appropriates that fund for the payment of debts, etc., or otherwise creates a mixed fund of realty and personalty for the payment of debts, etc., the two estates comprised in that fund are applicable pro ratâ. But in such case, if there is no conversion out and out, the surplus (if any) will result as real and personal estate. If a portion only of the personal estate is comprised in the fund, the residue will be chargeable only when that fund fails (c). (4) So where a devise is made, subject to a condition of paying off the incumbrances affecting the estate ;

FR. III. T. 1,  
CH. 3, S. 2.

(a) 2 Spence's Eq. Jur. 340—1, 818, 828 ; 2 Wms. on Executors, 1452—3.

(b) 2 Spence's Eq. Jur. 341 ; 2 Jarm. Wills, 2nd ed. 562 ; *Gilbertson v. Gilbertson*, 34 Beav. 354 ; *Powell v. Riley*, L. R. 12 Eq. 175.

(c) Coote Mortg. 3rd ed. 470 ;

2 Spence's Eq. Jur. 818 ; 2 Jarm. Wills, 2nd ed. 529, 531 ; *Simmons v. Rose*, 21 Beav. 37 ; 6 D. M. & G. 411 ; *Turner L. J.*, in *Tench v. Cheese*, 6 D. M. & G. 467 ; *Bright v. Larcher*, 3 D. & J. 148 ; *Allan v. Gott*, L. R. 7 Ch. Ap. 439.

PR. III. T. 1.  
CH. 8, s. 2.

or where only the residue of the proceeds of real estate, after payment of debts, is devised (a). But where real estate is devised to a person upon condition of his paying debts and legacies generally, or charged with them generally, or is given to trustees for those purposes, and the personal estate is disposed of by a general residuary bequest, these circumstances will not prevent the personal fund being applied in the first instance to the satisfaction of those demands (b). And if a testator expressly charges his personal estate with debts of a particular description, namely, with those by simple contract, and then bequeaths that fund, it will not be discharged from debts, etc., generally (c). And as a general rule, no extrinsic evidence can be admitted to ascertain the intention to exonerate : so that the circumstances of the testator, and the amount of his personal estate and of the debts, cannot be taken into consideration (d). 1387.

If the personal estate is exonerated from debts and legacies in favour of A., and he died before the testator, by which event the disposition lapsed, the executors or next of kin of the testator who accidentally become entitled to the fund will take it with its primary and natural obligation to discharge the debts and legacies (e). 1388.

2. Where  
the debt or  
charge is  
real.

2. Where the charge or incumbrance is, in its own nature, real ; as in the case of a jointure, or of pecuniary portions to be raised out of lands by the execution of a power ; or of pecuniary portions to be raised in favour of daughters, under a marriage settlement, out of lands vested in trustees for the purpose ; or of a devise of lands to a person, charged with, or with a direction to pay, particular sums of money, or to trustees in trust to raise and pay particular sums, as distinguished from a charge or trust for

(a) 2 Spence's Eq. Jur. 334, 342.

(b) 1 Rep. Leg. by White, 695.

(c) 1 Rep. Leg. by White, 706.

(d) 2 Spence's Eq. Jur. 337 ; 1 Rep. Leg. by White, 724.

(e) 1 Rep. Leg. by White, 744.

satisfaction of debts or legacies generally (a). And although there may be also a personal covenant to raise the jointure, portions, or sums, such covenant will only be regarded as an additional security, not as the primary one. If there is no such personal covenant for the payment of portions, but only a covenant to settle lands, and to raise a term of years out of the lands for securing the portions ; in such a case, even though there be a bond to perform the covenant, the portions are not in any event payable out of the personal estate. A mortgage debt (except in such cases as are mentioned in the next two paragraphs), whether the lands in mortgage devolve upon the heir-at-law, or upon a general devisee, or upon a particular devisee, is not considered as in its own nature real, but is primarily payable out of the general personal estate of the testator, where it is not made payable by a devisee. Where the mortgaged estate is devised cum onere, it is payable by the devisee. But the expression "subject to the mortgage," in the devise of a mortgaged estate, may sometimes be only descriptive of the estate, and not expressive of an intent that the devise is made cum onere (b). 1389.

3. Where the debt was not contracted by the person who died last seised or entitled, but by some other person from whom he took it by descent or devise, or by some other person from whom he purchased it, or from whom his vendor derived it. Thus, where a mortgage is created by an ancestor, and the mortgaged estate descends upon the heir, there, although the heir should enter into a collateral contract or covenant, or give security for payment of the mortgage, yet his personal estate would not be

Pr. III. T. 1,  
Ch. 3, s. 2.

3. Or was  
not con-  
tracted by  
the person  
who died  
last seised  
or entitled.

(a) 1 Rop. Leg. by White, 671 ;  
2 Jarm. Wills, 2nd ed. 543, 567—9.

(b) 2 Spence's Eq. Jur. 819 ; 1  
Rop. Leg. by White, 731—2 ; 11  
Jarm. & Byth. by Sweet, 797, n. (a) ;  
Coote Mortg. 3rd ed. 350, 452 ; 2

Jarm. Wills, 2nd ed. 534. On this  
subject, see *Jenkinson v. Harcourt*,  
Kay 688 ; *Bond v. England*, 2 K.  
& J. 44 ; *Townsend v. Mostyn*, 26  
Beav. 72 ; *Lady Langdale v. Briggs*.  
8 D. M. & G. 391.

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CH. 3, s. 2.

liable to be charged, in favour of any person who should derive title by descent under him to the mortgaged premises, subject to the mortgage. But it is different if the heir or devisee or purchaser has done anything which raises a new and independent contract between him and the mortgagee, unless it be simply for the purpose of paying off the debts or legacies of the original mortgagor, as such, or has in any other way made the debt his own (a). 1390.

4. In certain cases of a person dying entitled to land in mortgage after Dec. 31, 1854.

4. By the stat. 17 & 18 Vict. c. 113 (Locke King's Act), it is enacted, that, "when any person shall, after the 31st day of December, 1854, die seised of or entitled to any estate or interest in any land or other hereditaments which shall at the time of his death be charged with the payment of any sum or sums of money by way of mortgage, and such person shall not, by his will or deed or other document, have signified any contrary or other intention, the heir or devisee to whom such land or hereditaments shall descend or be devised, shall not be entitled to have the mortgage debt discharged or satisfied out of the personal estate or any other real estate of such person, but the land or hereditaments so charged shall, as between the different persons claiming through or under the deceased person, be primarily liable to the payment of all mortgage debts with which the same shall be charged, every part thereof, according to its value, bearing a proportionate part of the mortgage debts charged on the whole thereof: Provided always, that nothing herein contained shall affect or diminish any right of the mortgagee on such lands or hereditaments to obtain full payment or satisfaction of his mortgage debt, either out of the personal estate of the person so dying as afore-

(a) Story's Eq. Jur. § 571—576, 1003; 2 Spence's Eq. Jur. 334—336, 393, 394, 819, 824; Coote Mortg. 3rd ed. 453, 478, 479, 481; 1 Rep. Leg. by White, 735, 739,

742; 2 Jarm. Wills, 2nd ed. 536, 539; *Srainson v. Srainson*, 6 D. M. & G. 648; *Townsend v. Mostyn*, 26 Beav. 72; *Ion v. Ashton*, 28 Beav. 379; *Bagot v. Bagot*, 34 Beav. 134.

said or otherwise : Provided also, that nothing herein contained shall affect the rights of any person claiming under or by virtue of any will, deed, or document already made or to be made before the 1st of January, 1855." 1391.

PR. III. T. 1,  
CH. 3, s. 2.

An equitable mortgage by deposit and memorandum is within this Act (a). The Act extends to copyholds ; and the heir of an intestate, who, before the 1st of January, 1855, executed a mortgage, reserving the equity of redemption to himself and his heirs, is not within the saving clause in the Act, as the heir claims by descent ; [but it does not extend to leaseholds (b).] 1392.

By the stat. 30 & 31 Vict. c. 69, it is enacted, that, "in the construction of the will of any person who may die after the 31st day of December, 1867, a general direction that the debts or that all the debts of the testator shall be paid out of his personal estate shall not be deemed to be a declaration of an intention contrary to or other than the rule established by the said Act (17 & 18 Vict. c. 113), unless such contrary or other intention shall be further declared by words expressly or by necessary implication referring to all or some of the testator's debts or debt charged by way of mortgage on any part of his real estate" (s. 1) (c). And that "in the construction of the said Act, 17 & 18 Vict. c. 113, and of this Act (30 & 31 Vict. c. 69), the word 'mortgage' shall be deemed to extend to any lien for unpaid purchase money upon any lands or hereditaments purchased by a testator" (d). And by the stat. 40 & 41 Vict. c. 34 (Appendix), it is enacted that the stat. 17 & 18 Vict. c. 113, and 30 & 31 Vict. c. 69, "shall, as to any testator or intestate dying after

(a) *Pembroke v. Friend*, 1 Johns. & Hem. 132.

(b) *Piper v. Piper*, 1 Johns. & Hem. 91 ; *In re Wormsley's Estate*, *Hill v. Wormsley*, L. R. 4 Ch. D. 665.

(c) See *In re Rossiter*, L. R. 13 Ch. D. 355.

(d) This was held not to apply to a purchase by an intestate: *Harding v. Harding*, L. R. 13 Eq. 493.

**Pr. III. T. 1, Ch. 3, s. 2.** the 31st day of December, 1877, be held to extend to a testator or intestate dying seised or possessed of or entitled to any land or other hereditaments of whatever tenure which shall at the time of his death be charged with the payment of any sum or sums of money by way of mortgage, or any other equitable charge, including any lien for unpaid purchase money; and the devisee or legatee or heir shall not be entitled to have such sum or sums discharged or satisfied out of any other estate of the testator or intestate unless (in the case of a testator) he shall within the meaning of the said Acts have signified a contrary intention; and such contrary intention shall not be deemed to be signified by a charge of or direction for payment of debts upon or out of residuary real and personal estate or residuary real estate" (s. 1). **1393.**

Realty  
under  
Locke  
King's Act.

Where real and personal estate are comprised in the same mortgage, the mortgage debt is not primarily payable out of the realty, under Locke King's Act, but must, as between the devisees of the realty and the legatees of the personalty, be borne rateably by the real and personal estate subject thereto (a). But Locke King's Act applies to a mortgaged estate, different portions of which are devised to different persons; and the devisees must contribute according to the value of their respective portions (b). **1393a.**

Liability of  
property  
specifically  
bequeathed.

Property specifically bequeathed is not discharged from its liability to the testator's creditors, by the circumstances that there has come to the hands of the executor personal property of the testator not specifically bequeathed, more than sufficient to pay his debts and funeral and testamentary expenses, and that the specifically bequeathed property has been made over by the executor to the specific legatee,

(a) *Trestrail v. Mason*, L. R. 7 Ch. D. 655.

(b) *In re Newmarch*, L. R. 9 Ch. D. (Ap.) 12.

whatever may be the rights of the specific legatee as regards the executor or the residuary legatee (a). **1394.**

Pr. III. T. 1.  
Ch. 3, s. 2.

Where assets consisting of personalty which could be identified are settled bonâ fide upon marriage, they cease to be liable to subsequently accruing claims in respect of breach of covenants entered into by the testator, but of which the parties to the settlement had no notice when they executed it (b). **1395.**

Exemption  
of per-  
sonalty in  
settlement.

There is no equity between real and personal representatives of freehold and leasehold estates mortgaged generally, or even if the leasehold is to be a collateral security, unless the word "collateral" does not mean merely an additional or further security, but is used so as to signify a secondary security. Where the one mortgage is intended to be a primary security, and the other a secondary security, the first must bear the whole mortgage, if sufficient, before the other is resorted to, otherwise both will be applied rateably (c). **1395a.**

### III. *The Order of Satisfaction of different Claims.*

In the order of satisfaction, if the personal estate of the deceased is not sufficient for all purposes, creditors are preferred to legatees; because it is to be presumed that a testator means to be just, by desiring his debts to be paid, before he is generous; and the personal estate, as we have seen, is the natural fund for the payment of debts. And the payee of a promissory note, made in renewal of a previous note, for which there was no consideration, is entitled to payment out of the assets of the maker, in priority to legatees; at least where he and his executors have paid interest on the notes, and the second note was given in compromise of a dispute respecting the first note (d).

Order of  
satisfaction.

(a) *Davies v. Nicolson*, 2 D. & J. 693.

(c) *In re Athill*, L. R. 16 Ch. D. (Ap.) 211.

(b) *Dilkes v. Broadmead*, 2 D. F. & J. 560.

(d) *Dawson v. Kearton*, 3 Sm. & G. 186.

PR. III. T. 1.  
CH. 3, s. 2.

Again, specific legatees are preferred to the heir ; because the heir, instead of being expressly an object of the testator's regard, like the specific legatee, only takes by act of law. Specific legatees are also preferred to the devisee of real estate charged with specialities or with the payments of debts, and to residuary devisees of real estate. But general pecuniary legatees are not preferred to residuary devisees of real estate. Nor are specific devisees of land, not charged with specialities or with the payment of debts, preferred to specific legatees ; but upon failure of the general personal estate, the specific devisees and specific legatees shall each, according to the proportionate value of the benefits conferred on each, contribute to the payment of specialty debts. If a particular portion of the personal estate is bequeathed, subject to the payment of debts and legacies, there, as between the legatees, the residuary personal estate is exonerated, if there is a residuary bequest, but not where there is no gift of the residue (a). As between a devisee of a mortgaged fee simple estate and a specific legatee of personalty, the devisee shall not have his mortgage paid by the specific legatee, but shall take the mortgaged estate cum onere. A fortiori, a specific legatee of a mortgaged leasehold shall not have the mortgage wholly or partly paid off by specific legatees of other leaseholds (b). Subject to the stat. 17 & 18 Vict. c. 113 (c), the devisee of mortgaged premises is preferred to the heir at law of a descended estate ; because the devisee is evidently an object of the testator's bounty, whereas the heir at law is not. And, a fortiori, the devisee of premises not mortgaged is preferred to the heir at law. In case unincumbered lands and mortgaged lands are both specifically devised, but expressly after payment of all the debts, they are to contribute proportionately in discharge of the mortgage,

(a) 2 Spence's Eq. Jur. 343 ; Jarm. Wills, 2nd ed. 535.  
 Coote Mortg. 3rd ed. 474—5. (c) Supra, par. 1391—1393 a.  
 (b) 2 Spence's Eq. Jur. 838 ; 2



except so far as the stat. 17 & 18 Vict. c. 113 applies. Where the equities of the legatees and devisees are equal, the Court remains neuter, and suffers the law to prevail (a). **1396.**

Pr. III. T. 1,  
Ch. 3, s. 2.

But, subject to the stat. 17 & 18 Vict. c. 113, where the personal assets are sufficient to pay all the debts and legacies and other charges, there the heir at law or the devisee, who has been compelled to pay any debt or incumbrance of his ancestor or testator, binding on him, is entitled (unless there is some other equity which repels the claim) to have the debt paid out of the personal assets, in preference to the residuary legatees or distributees (b), because such charges are primarily payable out of personal estate; and lands devised for or subject to the payment of debts are also liable to discharge a mortgage, in favour of the heir or devisee to whom the mortgaged lands may belong, unless the mortgaged lands are really devised cum onere (c). **1397.**

The assignee for value of an equitable interest in the money payable under a voluntary bond, is entitled to rank as a specialty creditor for value against the assets of the obligor (d). **1398.**

#### IV. *Marshalling of Assets.*

There are many cases in which parties, whose right at law is confined to one fund, would fail to obtain satisfaction of their just claims, if left to the course of law, but are enabled to obtain full satisfaction thereof by means of a particular adjustment effected by equity, termed the marshalling of assets. This may be defined to be, such arrangement of the different funds of the same person as may satisfy every claim, so far as, without injustice, such assets can be applied in satisfaction thereof, notwithstanding the claims of particular individuals to prior satisfaction

Marshalling  
of assets.

(a) See Story's Eq. Jur. § 571; 2 Spence's Eq. Jur. 822, 832, 839; Coote Mortg. 3rd ed. 472.

(c) Story's Eq. Jur. § 571; 2 Spence's Eq. Jur. 822; Coote Mortg. 3rd ed. 471.

(b) Story's Eq. Jur. § 571.

(d) *Payne v. Mortimer*, 4 D. & J. 447.

Pr. III. T. 1.  
Ch. 3, s. 2.

out of some one or more of those funds (a). So that if there are two or more different kinds of funds of the same person, and at law one claimant can have recourse to either of those funds, while another is confined to one of them, the former shall either be compelled to seek satisfaction out of that fund to which the latter cannot resort, so far as it will extend, or the latter shall receive compensation out of that fund, in proportion to the amount which the former has unnecessarily taken from that which formed the only source of payment for the latter (b). 1399.

Marshalling  
in favour of  
creditors of  
an inferior  
rank, or of  
legatees, or  
of a portion-  
ist, or of the  
heir, or of a  
devisee.

This plan is adopted as against mortgagees and other creditors of the superior kind, in favour not only of other mortgagees and creditors of the superior kind, but also of creditors of an inferior rank, or of legatees (except residuary legatees, where the residue is not exonerated, and legatees whose legacies are given out of a residue), or of portionists, or of the heir at law, or of a devisee, and as against simple contract creditors, in favour of legatees (c), and as against a person who became surety for a mortgagor on the occasion of a first mortgage, in favour of a second mortgagee (d). Thus, legatees, with the above exceptions, are permitted to stand in the place of specialty creditors, against the real assets descended, or a mortgagee who has exhausted the personal estate, whether the mortgage lands have descended to the heir at law, or have been devised to a devisee who is to take subject to the mortgage. And where a testator bequeaths legacies, and devises his real estate subject to payment of debts, and his personal estate is exhausted by creditors, the legatees are entitled to come upon the real estate (e). But their equity will not gene-

Legatees  
put in the  
place of  
specialty  
creditors or  
a mortgagee,  
but not of a  
devisee of  
real estate  
not mort-  
gaged.

(a) See Story's Eq. Jur. § 558, 560, 561; 2 Spence's Eq. Jur. 827.

(b) See Story's Eq. Jur. § 558, 560, 562, 563; 2 Spence's Eq. Jur. 827, 828; 2 Jarm. Wills. 2nd ed. 576; *Gibson v. Seagrim*, 20 Beav. 614.

(c) See Story's Eq. Jur. § 562—566, 570; 2 Spence's Eq. Jur. 410, 819, 820, 827, 829, 833.

(d) *South v. Bloxam*, 2 Hem. & Mil. 457.

(e) *Surtree v. Parkin*, 19 Beav.

rally prevail against a devisee of the real estate not mortgaged, whether he is a specific or residuary devisee; for, between persons equally taking by the bounty of the testator, equity will not interfere, unless the testator has clearly indicated some ground of preference or priority of the one to or over the other (a). And residuary legatees, where the residue is not exonerated, and legatees whose legacies are given out of a residue, have no such equity, for a residue of personal estate implies what remains after satisfying the charges upon it (b). Upon the principle above mentioned, in consequence of the stat. 3 & 4 Will. 4, c. 104, which made real estate liable to simple contract debts, though it was subject to a priority in favour of specialty debts, legatees are permitted to stand, in regard to land descended, in the place of simple contract creditors who have exhausted the personal estate so as to prevent a satisfaction of the legacies, as they were permitted before that statute, where lands were subjected by the testator to the payment of all debts (c). 1400.

PT. III. T. I.  
CH. 3, s. 2.

Legatees put  
in the place  
of simple  
contract  
creditors.

Where one person has a charge on freehold and copyhold estate, and another person a charge on the freehold only, the latter is entitled to require that the former should be satisfied out of the copyhold estate, so far as it will extend (d). 1401.

Marshalling  
as between  
freehold and  
copyhold.

The same marshalling of assets takes place as between legacies charged on land and legacies not so charged (e). But since the stat. 9 Geo. 2, c. 36, legacies or bequests to charitable uses, payable out of real estate, or personalty connected with realty, or charged on real estate, or to arise from the sale of real estate, are, with some exceptions,

Marshalling  
as between  
legacies  
charged on  
land and  
others not so  
charged.  
Administra-  
tion in the  
case of  
charitable  
legacies.

406; *Paterson v. Scott*, 1 D. M. & G. 531.

(a) Story's Eq. Jur. § 565; 2 Spence's Eq. Jur. 820, 829—832, 2 Jarm. Wills, 2nd ed. 572—3.

(b) 3 Spence's Eq. Jur. 820.

(c) Story's Eq. Jur. § 566; 2 Spence's Eq. Jur. 830.

(d) *Tidd v. Lister*, 10 Hare 157; 3 D. M. & G. 857.

(e) Story's Eq. Jur. § 566.

Pr. III. T. 1,  
Ch. 3, s. 2.

utterly void (a): and equity has in some modern cases refused to marshal the assets in favour of any charitable bequests, when given, either directly or by way of trust, out of a mixed fund of real and personal estate, or of personalty connected with realty and pure personalty. Instead of directing the debts and the other legacies to be paid out of the realty or impure personalty, and reserving the pure personalty for the charitable bequests, the charity legacies have been considered as intended to be charged on the personal estate and proceeds of real estate or the impure personalty proportionately, like other legacies, as if no legal objection existed to applying the proceeds of the real estate or impure personalty to the charitable bequests; and as charity legacies cannot be charged on the proceeds of real estate or on impure personalty, they have been held to fail as to so much as would have to come out of the proceeds of the real estate or the impure personalty (b). Not only has the principle of favour to charities been discarded, but the Courts have, very improperly (as the writer humbly submits), acted upon a diametrically opposite principle. A testator has the power of directing the charity legacies to be paid out of the pure personalty, and the debts and private legacies out of the mixed personalty or realty (c). And where a testator expressly directs charity legacies to be paid exclusively out of his pure personalty, and the personalty savouring of realty is sufficient for the payment of legacies to individuals, and though the will does not throw

(a) Story's Eq. Jur. § 569. See *supra*, par. 739—785.

(b) See Story's Eq. Jur. § 569, 1180; 2 Spence's Eq. Jur. 233, 235; *Brook v. Badley*, L. R. 3 Ch. Ap. 672, 675; *Miles v. Harrison*, L. R. 9 Ch. Ap. 316.

(c) See Lord Langdale's judg-

ment in the *Philanthropic Society v. Kemp*, 4 Beav. 581, and *Robinson v. Geldard*, 3 Mac. & Gord. 735; and remarks of V.-C. Stuart, in *Jamney v. Att.-Gen.*, 3 Gif. 319, 320; *Wills v. Bourne*, L. R. 16 Eq. 487; *Miles v. Harrison*, L. R. 9 Ch. Ap. 316.

the legacies to individuals upon the personalty savouring of realty, yet it does not purport to make those legacies payable at all out of the pure personalty, but gives them without reference to any particular fund, and the pure personalty is not sufficient, or only sufficient for the payment of the charity legacies; the legacies to individuals are to be paid out of the personalty savouring of realty, so as to leave the pure personalty for the payment of the charity legacies (a). But even in the absence of such an express adjustment, the writer conceives that the Courts ought to have imputed to testators an intention that the charity legacies should be paid out of that fund alone out of which they lawfully might be paid. **1402.**

Where a testator directs charity legacies to be paid out of pure personalty in precedence of other legacies, but is silent as to the fund for payment of debts, there, though the pure personalty be insufficient to pay all the charity legacies, yet it has been improperly held that the debts and funeral and testamentary expenses and the costs of the suit must be payable in the first instance out of the pure personalty and the mixed personalty rateably, according to their relative values (b). **1403.**

Marshalling of assets takes place as between simple contract creditors and a vendor of real estate, in respect of his lien for his unpaid purchase money (c). And as against an heir taking an estate purchased, legatees are entitled to have the assets marshalled so as to give them the benefit of the vendor's lien (d). And it has been held by Sir J. Romilly, M. R., that this doctrine applies as against a devisee taking the purchased estate (e). **1404.**

Marshalling  
as between  
simple contract  
debts  
and a  
vendor  
lien.

(a) *Robinson v. Geldard*, 3 Mac. & Gord. 735, 747; *Beaumont v. Oliveira*, L. R. 6 Eq. 534; 4 Ch. Ap. 309; *Miles v. Harrison*, L. R. 9 Ch. Ap. 316.

(b) *Tempest v. Tempest*, 7 D. M.

& G. 740.

(c) Story's Eq. Jur. § 564 a.

(d) 2 Spence's Eq. Jur. 833; 2 Jarm. Wills, 2nd ed. 574.

(e) *Birds v. Askey*, 24 Beav. 618;

*Lord Lilford v. Powys Keck*, L. R.

Pr. III. T. 1.  
Ch. 3, s. 2.

Redemption  
or exonera-  
tion of a  
specific  
legacy.

On analogous grounds, if a specific legacy has been pledged or incumbered with mortgages or other charges by the testator, the specific legatee is entitled to have his legacy redeemed or exonerated; and if the executor fails to perform that duty, the specific legatee is entitled to compensation out of the general assets (a). 1405.

*V. The Mode of Distribution of the Personal Estate of an Intestate among his or her Family or Relatives, by the General Law.*

Persons claiming property as next of kin to an intestate, and showing their kindred, are entitled, in the absence of evidence that a person now dead and nearer of kin to the intestate, survived him. The onus rests on those claiming through a deceased nearer of kin to the intestate, to show that such deceased survived the intestate (b). 1406.

Law of  
domicile  
followed.

Where an intestate was domiciled abroad, the distribution of his chattels personal is according to the law of the country where he was domiciled at the time of his death (c). But where the intestate was domiciled in this country, the mode of distribution, by the general law, is this:— 1407.

Distribution  
on death of  
wife.

I. On the death of the wife, her effects shall go to the husband, according to the common law (d). 1408.

Distribution  
on death of  
husband.

II. On the death of the husband, the surplus, after payment of funeral and testamentary expenses, shall, after the expiration of one year from the intestate's death, be distributed according to the statute 22 & 23 Car. 2, c. 10,

1 Eq. 347. But see 2 Spence's Eq. Jur. 833; *Wythe v. Henniker*, 2 My. & K. 635.

(a) Story's Eq. Jur. § 566 a; 2 Spence's Eq. Jur. 774; 2 Jarm. Wills, 2nd ed. 532.

(b) *In re Green's Settlement*, L. R. 1 Eq. 288.

(c) Wms. Exors. 4th ed. 1301; 1 Jarm. Wills, 2nd ed. 2—10.

(d) 2 Bl. Com. 515; Wms. Exors. 4th ed. 1276.

explained by 29 Car. 2, c. 31, s. 25, in the following manner:— **1409.**

Pr. III. T. 1  
Ch. 3, s. 2.

1. If there is no widow the whole shall go to the descendants, whether children or more remote issue, and whether born in the father's lifetime or not, without any distinction as to sex, or the half blood, or, if but one descendant, to that one. And if all the descendants are related to the intestate in the same degree, they shall take per capita (*a*); but if they are related to him in different degrees, they shall take per stirpes (*b*): so that if the intestate has left no surviving descendants but grandchildren, whether by one child or several, all such grandchildren will take equal shares; but if any of his children are living, all the grandchildren by the same parent deceased shall take together, and divide equally, among themselves, that share only which would have fallen to their parent, if living. **1410.**

2. If there is a widow, and her claim is not barred by a settlement before marriage, one-third shall go to her, and two-thirds to the descendants or sole descendant in the manner above mentioned (*c*). **1411.**

3. If there is a widow, whose claim is not barred by settlement before marriage, but there are no descendants, one moiety shall go to the widow, and the other moiety to all the next of kin per capita (*d*). **1412.**

4. If there is a widow, but there are no descendants and no next of kin, one moiety shall go to her, and the other moiety to the Crown (*e*). **1413.**

5. If there is no widow, and there are no descendants, the whole shall go to the next of kin per capita (*f*). **1414.**

(*a*) Wms. Exors. 4th ed. 1284.  
But see Burton, § 1402—3.

(*b*) Wms. Exors. 4th ed. 1284—5; Burton, § 1402; *In re Ross's Trusts*, L. R. 13 Eq. 286.

(*c*) 2 Bl. Com. 515; Wms. Exors. 4th ed. 1277—8.

(*d*) 2 Bl. Com. 515; Wms. Exors. 4th ed. 1277—8.

(*e*) *Cave v. Roberts*, 8 Sim. 214; Wms. Exors. 4th ed. 1278.

(*f*) 2 Bl. Com. 515; Wms. Exors. 4th ed. 1292.

PL. III. T. 1,  
CH. 3, s. 2.

6. If there is no widow, and there are no descendants and no next of kin, the whole shall go to the Crown. 1415.

How next  
of kin are  
ascertained.

For the purpose of ascertaining who is nearest of kin or of blood with reference to personal estate exclusively, the civil law mode of computing the degrees of relationship is adopted (a). And there is no preference between those on the side of the father and those on the side of the mother, or between the whole blood and the half; all in equal degree taking together (b). 1416.

Where  
relatives  
take though  
not next of  
kin, or some  
next of kin  
take in  
exclusion of  
others.

As regards the next of kin there are three exceptions :

(1). If the father is dead, but the mother is living, though she is the next of kin, yet each of the intestate's brothers and sisters or their children, but not remoter issue, shall take an equal share with her under the statute 1 Jac. 2, c. 17 (c). 1417.

(2). When there are surviving brothers and sisters of the intestate who are the only next of kin, they shall not take the entirety, or, in case there is a widow, the whole of the moiety, to the exclusion of the child or children of any deceased brother or sister; but such child or children shall take the share which would have fallen to his, her, or their parent, if living. But the right of representation among collaterals does not extend to any other case (d). 1418.

(3). Grandfathers and grandmothers, though they are in the second degree, as well as brothers and sisters, shall be excluded by a brother or sister (e). 1419.

Advance-  
ments.

And with regard to the shares of the children, it must be observed that no child of the intestate for whom he has in his lifetime made any provision in lands, except his heir at

(a) 2 Bl. Com. 515; Wms. Exors. 4th ed. 345; Burton, § 1409; *Cooper v. Denison*, 13 Sim. 290.

(b) Wms. Exors. 4th ed. 348. 1292, 1297.

(c) 2 Bl. Com. 516; Wms. Exors.

4th ed. 1293—5; Burton, § 1409.

(d) 2 Bl. Com. 515; Wms. Exors. 1299; Burton, § 1411, n.

(e) Wms. Exors. 4th ed. 1296; see Burton, § 1410.



law, and no child for whom he has made any pecuniary provision, shall have any part in the residue, if such provision was equal to the distributive shares of the other children ; but if such provision was not equivalent thereto, then the child for whom it was made, or the representatives of such child, shall receive as much of the residue as will make it equivalent thereto (a). 1420.

Pr. III. T. 1.  
Ch. 3, s. 2.

VI. *The mode of Distribution of the personal Estate of an Intestate among his or her Family or Relatives, by the Customs of London and York.*

By the old law, if an intestate, who was a freeman of the city of London, or an inhabitant of the province of York (except the diocese of Chester), or of some parts of Wales, left a widow and children, one-third of his personalty belonged to the widow, one-third to the children, and one-third to the administrator. If he left a widow but no children, or children but no widow, the widow in the first case, and the children in the second, took one moiety, and the administrator the other moiety. If he left neither widow nor children, the whole passed to the administrator. 1421.

The part which passed to the administrator, and which was called "the dead man's part," might formerly be applied by the administrator to his own use, but since the stat. 1 Jac. 2, c. 17, it was distributable in the same manner as intestates' effects by the general law. 1422.

As to the wife's customary part, a settlement of personalty on her before marriage will ordinarily be presumed to be and will operate as a bar of such customary part ; and of course a jointure of land before marriage, in bar of her customary part, would have the same effect. But in both

(a) Burton, § 1404—1407 ; Wms. *Boyd v. Boyd*. L. R. 4 Eq. Exors. 4th ed. 1285—1292. See 305.

cases, though the customary distribution was made in the same manner as if there were no widow, yet she had her share of the administrator's part under the statute, unless barred by special agreement. And before any division was made according to a custom, a deduction was to be made of the widow's apparel, and of the furniture of her bed-chamber when in London was called the widow's chamber, or £50 in lieu of it if her husband's estate exceeded in value £200. 1423.

There was the same rule for equalization of the shares of the children, in the case of pecuniary advancements, as in corresponding cases under the general law. But in London an advancement out of real estate was not taken into account; while in the province of York, the heir at common law who inherited any land in fee, or in tail, however inconsiderable, in possession or reversion, was excluded from any final portion or reasonable part (a). 1424.

The custom of London adhered to the person, though resident in the country, or though his property were situate in the country. But the custom of York was confined to persons whose fixed and principal residence was within the province at the time of their decease. 1425.

By the custom of London, the grandchildren or more remote issue took none of the customary part. And where there was more than one child, the orphanage part of the children was not fully vested in them till twenty-one; for, if they died before that age, their orphanage part survived to the other children. 1426.

By the custom of London, terms for years attendant on the inheritance were not assets within the custom. And, ordinarily, leases were not assets within the custom of the province of York; though they were so by the special custom of some places within the province (b). 1427.

(a) See 2 Bl. Com. 518—520; (b) Wms. Exors. 4th ed. 1329.  
Wms. Exors. 4th ed. 1309—1328.

Where a freeman of the city of London made a bequest on trusts which failed for remoteness, the property comprised in the bequest became distributable according to the general law; because by availing himself of the statutory power to make the bequest, he displaced the custom (*a*). But where he appointed no executor, and only made a bequest for life of a term, the residue of the term was distributable according to the custom (*b*). 1428.

By the stat. 19 & 20 Vict. c. 94, entitled "An Act for the uniform administration of intestates' estates," special customs of distribution are abolished, in the case of all persons dying on or after the 1st of January, 1857, and the personal estates of all persons so dying are to be distributed according to the rules of the general law: "The special customs concerning the distribution of the personal estate of intestates observed in the city of London, or in relation to the citizens and freemen of such city, and in the province of York, and certain other places, shall, with reference to all persons dying on or after the first day of January one thousand eight hundred and fifty-seven, wholly cease and determine, and the distribution of the personal estate of all parties so dying shall take place as if such customs had never existed, and as if the rules for the distribution of the personal estate of intestates generally prevalent in the province of Canterbury had prevailed throughout England and Wales, any law or statute to the contrary notwithstanding." 1429.

Special  
customs  
concerning  
the distribu-  
tion of  
personal  
estates of  
intestates in  
certain  
places to  
cease.

(*a*) *Pickford v. Brown*, 2 K. & J. 426. 432.

(*b*) *Chappell v. Haynes*, 4 K. & J. 163.

## TITLE II.

### OF ESCHEAT.

**PART III.** ESCHEAT is an accidental determination of the tenure and  
**TITLE II.** reverting of the land to the original grantor or lord of the  
 Definition. fee, by the death of a legal tenant in fee, without heirs inheritable to the estate or any devisee or alienee to claim it, or by an attainder for treason or murder under the old law, prior to the stat. 33 & 34 Vict. c. 23, s. 2, whereby escheat for crime is abolished (a). **1430.**

Lord in by title paramount. On an escheat, the lord is in by a title paramount and extraneous to that of the tenant, or, as it is technically termed, *in the post*: he is in of an estate from which the estate of the tenant was originally derived; in contradistinction to those who derive their title through or under the tenant, and therefore are said to be *in the per* (b). **1431.**

No escheat of an equitable estate. Where a person who has only an equitable estate dies without heirs, the estate does not escheat; for neither the Crown nor the lord can enter or seize where there is a legal tenant in possession; the right to the service of the tenant in possession being all that the Crown or lord can properly require. And hence where a mortgage in fee is made, and the mortgagor dies intestate and without heirs, the equity of redemption does not escheat, but belongs to the mortgagee, subject to the debts (c). **1432.**

Statutory exemptions from escheat. By the stat. 13 & 14 Vict. c. 60 (which repeals the stats. 11 Geo. 4 & 1 Will. 4, c. 60; 4 & 5 Will. 4, c. 23, s. 2; and 1 & 2 Vict. c. 69, whereby similar provisions

(a) Co. Litt. 13 a. Before the stat. 54 Geo. 3, c. 145, escheat was caused by attainder in many cases of felony. See 1 Steph. Com. 3rd ed. 423, 427; 2 Bl. Com. 246; 1 Steph. Com. 3rd

ed. 415, 427.

(b) Watk. Conv. 3rd ed. by Prest. 94; Co. Litt. 271 b, n. 1, II.

(c) *Beale v. Symonds*, 16 Beav. 406.

were made), the Court is empowered to make an order vesting lands in such person or persons, in such manner, and for such estate as it shall direct, where a trustee thereof shall have died intestate, and without an heir, or shall have died, and it shall not be known who is his heir or devisee (*a*), and in certain cases where a mortgagee has died without having an heir, or has died, and it is not known who is his heir or devisee (*b*). And by s. 46 of the same statute, "no lands, stock, or chose in action vested in any person upon any trust or by way of mortgage, or any profits thereof, shall escheat or be forfeited to Her Majesty, her heirs or successors, or to any corporation, lord or lady of a manor, or other person, by reason of the attainder or conviction for any offence of such trustee or mortgagee, but shall remain in such trustee or mortgagee, or survive to his or her co-trustee, or descend or vest in his or her representative, as if no such attainder or conviction had taken place." **1433.**

Even where an escheat has actually taken place, the Crown is empowered by various statutes to waive the right (*c*). **1434.**

Waiver of  
escheat.

(*a*) Sect. 15.

(*b*) Sect. 19.

(*c*) See 39 & 40 Geo. 3, c. 88, s. 12; 47 Geo. 3, sess. 2, c. 24; 59

Geo. 3, c. 94; 6 Geo. 4, c. 17;  
Stamp's Index to the Statute Law,  
tit. "Trustees."

## TITLE III.

### OF OCCUPANCY (a).

PART III.  
TITLE III.

Definition.

Special  
occupancy  
of estates  
pour autre  
vie.

OCCUPANCY is the taking possession of a thing which has no owner. **1435.**

In the case of a limitation of an estate in corporeal hereditaments to a man and his heirs, or to him and the heirs of his body, for the life of another, if the grantee dies in the lifetime of the cestui que vie, the heir or heir of the body of the grantee becomes entitled to the estate for the rest of the life of the cestui que vie. In this case he succeeds as a special occupant, as having a special exclusive right by the terms of the grant to occupy this quasi hæreditas jacens, and not by descent (b). So in the case of a limitation of corporeal hereditaments to a person and his executors or administrators, for the life of another, the executor or administrator takes as a special occupant (c). And it would seem that the rules apply in the case of incorporeal hereditaments limited to a person and his heirs or the heirs of his body, or his executors or administrators, for the life of another (d). If an estate pour autre vie is limited to a man, his heirs, executors, administrators, and assigns, it descends to the heir as a special occupant, in preference to the executors (e). **1436.**

(a) See remarks of Fry, J. in *Re Barber's Settled Estates*, L. R. 18 Ch. D. 627.

(b) 2 Bl. Com. 259, 260; Burton, § 731—2; Watk. Conv. 3rd ed. by Prest. 37, 38; and remarks of V.-C. Kindersley in *Northen v. Carnegie*, 4 Drew. 590.

(c) Sugd. Concise View, 235, n.; Burton, § 733; and remarks of V.-C. Kindersley in *Northen v. Carnegie*, 4 Drew. 592.

(d) See *Northen v. Carnegie*, 4 Drew. 587, 591—2.

(e) 1 Cruise T. 3, c. 1, s. 52.

There may be a special occupant of an equitable estate pour autre vie (a). 1437. PART III.  
TITLE III.

By the common law, where an estate in corporeal hereditaments of freehold tenure was granted to a person (without mentioning his heirs, executors, or administrators) for the life of another, if the grantee died during the lifetime of the cestui que vie, he who first entered might lawfully retain possession, so long as cestui que vie lived, by right of common occupancy (b). But, if an estate pour autre vie, in corporeal hereditaments of freehold tenure, were granted to a person, without naming his heirs, executors, or administrators, and the grantee assigned to a person and his heirs, the title by common occupancy was precluded (c). And by the Statute of Frauds, 29 Car. 2, c. 3, s. 12, it was enacted, "that any estate pour autre vie shall be devisable by a will in writing signed by the party so devising the same, or by some other person in his presence and by his express directions, attested, and subscribed in the presence of the devisor by three or more witnesses. And if no such devise thereof be made, the same shall be chargeable in the hands of the heir, if it shall come to him by reason of a special occupancy, as assets by descent, as in case of lands in fee simple : and in case there shall be no special occupant thereof, it shall go to the executors or administrators of the party that had the estate thereof by virtue of the grant, and shall be assets in their hands." By stat. 14 Geo. 2, c. 20, s. 9, estates pour autre vie of which there was no special occupant, and which had not been devised according to the Statute of Frauds, were directed to "be applied and distributed in the same manner as the personal estate of the testator or intestate" (d). These

Where common occupancy of such estates existed.

Enactments on the subject.

(a) *Reynolds v. Wright*, 29 Beav. 590.

(b) 2 Bl. Com. 258, 260; Co. Litt. b; Burton, § 730, 733.

(c) Burton, § 731.

(d) Burton, § 1417; Co. Litt. 41 b (6).

PART III.  
TITLE III.

enactments are repealed by the stat. 1 Vict. c. 26, s. 2 ; but by s. 3, it is enacted, that the power of testamentary disposition thereby given shall extend "to estates pour autre vie, whether there shall or shall not be any special occupant thereof, and whether the same shall be freehold, customary freehold, tenant right, customary, or copyhold, or of any other tenure, and whether the same shall be a corporeal or an incorporeal hereditament." And by s. 6, it is enacted, "that if no disposition by will shall be made of any estate pour autre vie of a freehold nature, the same shall be chargeable in the hands of the heir, if it shall come to him by reason of special occupancy, as assets by descent, as in the case of freehold land in fee simple ; and in case there shall be no special occupant of any estate pour autre vie, whether freehold or customary freehold, tenant right, customary or copyhold, or of any other tenure, and whether a corporeal or incorporeal hereditament, it shall go to the executor or administrator of the party that had the estate thereof by virtue of the grant : and if the same shall come to the executor or administrator either by reason of a special occupancy or by virtue of this Act, it shall be assets in his hands, and shall go and be applied and distributed in the same manner as the personal estate of the testator or intestate" (a). But by s. 34, it is enacted, "that this Act shall not extend to any estate pour autre vie of any person who shall die before the 1st day of January, 1838." 1438.

Estate pour  
autre vie in  
copyholds ;

and in lands  
held in  
trust ;

There could be no common occupancy of copyholds ; because the freehold is in the lord ; and therefore by the death of the grantee pour autre vie, though in the lifetime of the cestui que vie, the estate ceased (b). And there could be no occupancy of an estate held in trust, because

(a) See *Reynolds v. Wright*, 2 2 Jarm. & Byth. by Sweet, 201 ;  
Beav. 100. Co. Litt. 41 b, n. 3.

(b) 1 Cruise T. 10, c. 2, § 24, 25 ;



the trustee is in possession (a). And by the common law there could be no common occupancy of incorporeal hereditaments, because, with respect to them, there could be no actual entry made or corporeal seisin had (b). **1439.**

PART III.  
TITLE III.  
and in  
incorporeal  
heredita-  
ments.

There is now no case in which common occupancy can arise. When a tenant dies intestate and no other owner is to be found in the common course of descent, there the law vests the ownership in the Crown or in the subordinate lord of the fee by escheat (c). And so in the case of lands newly created, the law assigns them an immediate owner (d). **1440.**

Common  
occupancy  
has ceased.

[With reference to tenants pour autre vie, it should be remembered, that by virtue of stat. 45 & 46 Vict. c. 38, s. 58 (Appendix), a tenant pour autre vie of settled land, when in possession, has all the powers of a tenant for life under that Act.] **1440a.**

Stat. 45 & 46  
Vict. c. 38  
s. 58.  
The Settled  
Land Act,  
1882.  
Powers of  
tenant pour  
autre vie.

(a) See *Penny v. Allen*, 7 D. M. & G. 422—4.

n. 3, 388 a ; 3 Cruise T. 28, c. 2, § 4, 5.

(b) See 2 Bl. Com. 260 ; 1 Sugd. Pow. 235 n ; Co. Litt. 41 b &

(c) 2 Bl. Com. 261.

(d) See next title.

## TITLE IV.

### OF ALLUVION AND DERELICTION.

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**If an island arises in the middle of a river, and the soil of the river belongs equally to the owners of the opposite shores, the island belongs in common to them. But if it is nearer to one bank than to the other, it belongs exclusively to the proprietor of the nearest shore. And if the whole soil of the river is the freehold of any one person, as it must be whenever a several piscary is claimed, the eyots or little islands that arise in any part of the river belong to him (a). 1441.**

As to lands gained from the sea, either by alluvion, by the washing up of sand and earth, or by dereliction, as when the sea shrinks back below the usual watermark, in these cases, if the alluvion or dereliction is sudden and considerable, it belongs to the Crown ; but if otherwise, it belongs to the owner of the land adjoining ; for *de minimis non curat lex* ; and besides, these owners are often losers by the breaking in of the sea, or at charges to keep it out (b). 1442.

If a river, running between two lordships, by degrees gains upon the one, and thereby leaves the other dry, the owner who thus imperceptibly loses his ground has no remedy. But if the course of the river is changed by a sudden and violent flood, or other hasty means, and thereby a man loses his ground, he shall have what the river has left in any other place, as a recompense for this sudden loss (c). 1443.

(a) 2 Bl. Com. 261.

(c) Ibid.

(b) Ibid.

## TITLE V.

## OF PRESCRIPTION.

**PRESCRIPTION** is a title to an incorporeal hereditament by mere usage, on the part of a particular person and his ancestors, or those whose estate he has, or on the part of a body politic and its predecessors (*a*). It is rather an evidence of a former acquisition, than an acquisition *de novo* (*b*). 1444.

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Definition.

The distinction between custom and prescription is this : custom is properly a usage annexed to localities ; prescription is a usage annexed to a particular person, and those under whom he claims, or to a body politic and its predecessors (*c*). 1445.

Distinction  
between  
custom and  
prescription.

A custom or prescription must be certain and reasonable (*d*). And hence a custom or prescription that mining rights may be exercised so as to injure the foundations of dwelling-houses, without compensation, is unreasonable and bad (*e*). And so is a claim by custom or prescription to carry away the soil of another, without limit, to the destruction of his inheritance, by working stone quarries (*f*). But a custom for the inhabitants of a parish to enter upon certain land (whether it is a village green or a common, or a private close) and erect a maypole thereon, and dance round and about it, and otherwise enjoy on the land any lawful and innocent recreation at any times in the year, is good (*g*). 1446.

A custom or  
prescription  
must be  
certain and  
reasonable.

(*a*) 2 Bl. Com. 263, 264 ; Co. Litt. 113 b ; 3 Cruise T. 31, c. 1, § 5, 6, 8 ; *Constable v. Nicholson*, 14 C. B. (N. S.) 230.

(*b*) 2 Bl. Com. 266.

(*c*) Co. Litt. 113 b ; 2 Bl. Com. 263 ; 3 Cruise T. 31, c. 1, § 7.

(*d*) 3 Cruise T. 31, c. 1, § 28.

(*e*) *Hilton v. Earl Granville*, 4 Beav. 130 ; Cr. & Phil. 283 ; 5 Ad. & E. (N. S.) 701.

(*f*) *Att.-Gen. v. Mathias*, 4 K. & J. 579.

(*g*) *Hall v. Nottingham*, L. R. 1 Ex. D. 1.

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What may  
be claimed  
by custom  
or by pre-  
scription.

An easement may be claimed by custom ; but a profit à prendre in alieno solo cannot be claimed by custom. No common or profit à prendre can be claimed by custom, except in the single case of copyholders within the manor in which they hold lands and tenements. A right claimed by the inhabitants of a parish to cut wood growing on a common belonging to the lord of the manor, for use as fuel in their own houses, is such a right, and therefore cannot exist by custom, or prescription, or grant, unless it be a Crown grant which incorporates the inhabitants. Such a Crown grant will not be presumed from proof of user by the inhabitants, where the tenants of the manor have exercised inconsistent rights, founded on an assertion of entire control over the underwood (a). 1447.

A prescription cannot be for a corporeal hereditament (b). Thus, a right to a stratum of coal, lying under a certain close, that is, the right to the stratum itself, is a right to land, and cannot be claimed by prescription. But a right of getting coal, sand, gravel, etc., in another man's land may be claimed by prescription (c). A prescription cannot be for a thing which could never be raised by a grant, such as a tax or toll upon strangers ; for the law allows prescription only in supply of the loss of a grant, and therefore every prescription presupposes a grant to have existed (d). Nor can a man prescribe for what cannot be had without matter of record ; such as felon's goods (e). Nor, if a man prescribes in a que estate, that is, in himself and those whose estate he holds, can he claim anything but such things as are incident, appendant, and appurtenant to the

(a) *Constable v. Nicholson*, 14 C. B. (N. S.) 230 ; *Chilton v. Corp. of London*, L. R. 7 Ch. D. 735 ; *Lord Rivers v. Adams*, L. R. 3 Ex. D. 361, 364.

(b) 2 Bl. Com. 264 ; 3 Cruise T. 31, c. 1, § 5.

(c) *Wilkinson v. Proud*, 11 M. & W. 33 ; *Constable v. Nicholson*, 14 C. B. (N. S.) 320.

(d) 2 Bl. Com. 265 ; 3 Cruise T. 31, c. 1, § 11.

(e) Co. Litt. 114 a, b ; 2 Bl. Com. 265 ; 3 Cruise T. 31, c. 1, § 10.

estate ; as an advowson appendant, or a common appurtenant (a). And a person cannot prescribe for anything in a que estate that lies in grant, and cannot pass without deed or fine ; but he may prescribe in him and his ancestors, because he comes in by descent without any conveyance (b). **1448.**

In whom a prescription in a que estate must be laid.

A prescription in a que estate must always have been laid in the tenant of the fee, as it was a contradiction that a person having a limited interest which commences within the remembrance of man, should prescribe. Hence, a copyholder must prescribe under cover of his lord's estate, and a tenant for life, under cover of the tenant in fee simple (c). **1449.**

Proof of commencement of right.

By the old law, where there was any proof of the commencement or origin of a right since the time of Richard I., it could not be claimed by prescription (d), although where a title was once gained by prescription, it was not lost by any interruption of the enjoyment of it for ten or twenty years (e). **1450.**

Claims to right of common and other profits à prendre not to be defeated after thirty years' enjoyment by showing the commencement.

By the stat. 2 & 3 Will. 4, c. 71, intituled, "An Act for shortening the time of prescription in certain cases," "no claim which may be lawfully made at the common law, by custom, prescription, or grant, to any right of common or other profit or benefit to be taken and enjoyed from or upon any land of our Sovereign Lord the King, his heirs or successors, or any land being parcel of the Duchy of Lancaster or of the Duchy of Cornwall, or of any ecclesiastical or lay person, or body corporate, except such matters and things as are herein specially provided for, and except tithes, rent, and services, shall, where such right, profit, or benefit shall have been actually taken and

(a) 2 Bl. Com. 266 ; 3 Cruise T. 31, c. 1, § 18.

(b) Co. Litt. 121 a 3 ; Cruise T. 31, c. 1, § 19.

(c) 2 Bl. Com. 265 ; 3 Cruise T. 31, c. 1, § 9.

(d) 3 Cruise T. 31, c. 1, § 23.

(e) 3 Cruise T. 31, c. 1, § 25.

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enjoyed by any person claiming right thereto without interruption for the full period of thirty years, be defeated or destroyed by showing only that such right, profit, or benefit was first taken or enjoyed at any time prior to such period of thirty years, but nevertheless such claim may be defeated in any other way by which the same is now liable to be defeated; and when such right, profit, or benefit shall have been so taken and enjoyed as aforesaid for the full period of sixty years, the right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was taken and enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing." 1451.

After sixty years' enjoyment the right to be absolute, unless had by consent or agreement.

In order to establish a right under the Prescription Act, it is only necessary to show that the benefit claimed has been actually enjoyed by the claimant for the requisite period, not by permission, but as of right, that is to say, as a thing which he was entitled to do under some right or other, and that the right so claimed is one which could have legal origin by custom, prescription, or grant; and it is immaterial on what ground the claimant rested his right (a). 1451a.

In claims of right of way or other easement, the periods to be twenty years and forty years.

By s. 2 "no claim which may be lawfully made at the common law, by custom, prescription, or grant, to any way or other easement, or to any watercourse, or the use of any water to be enjoyed or derived upon, over or from any land or water of our said Lord the King, his heirs or successors, or being parcel of the Duchy of Lancaster or of the Duchy of Cornwall, or being the property of any ecclesiastical or lay person, or body corporate, when such way or other matter as herein last before mentioned shall have been actually enjoyed by any person claiming right thereto without interruption for the full period of twenty years, shall be defeated or destroyed by showing only that such

(a) *Earl De La Warr v. Miles*. L. R. 17 Ch. D. (Ap.) 535.

way or other matter was first enjoyed at any time prior to such period of twenty years, but nevertheless such claim may be defeated in any other way by which the same is now liable to be defeated ; and where such way or other matter as herein last before mentioned shall have been so enjoyed as aforesaid for the full period of forty years, the right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was enjoyed by some consent or agreement expressly given or made for that purpose by deed or writing." **1452.**

By s. 3, "when the access and use of light to and for any dwelling-house, workshop, or other building shall have been actually enjoyed therewith for the full period of twenty years without interruption, the right thereto shall be deemed absolute and indefeasible, any local usage or custom to the contrary notwithstanding, unless it shall appear that the same was enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing" (a). **1453.**

Claim to the use of light enjoyed for twenty years indefeasible, unless shown to have been by consent.

By s. 4, "each of the respective periods of years herein before mentioned shall be deemed and taken to be the period next before some suit or action wherein the claim or matter to which such period may relate shall have been or shall be brought into question ; and no act or other matter shall be deemed to be an interruption, within the meaning of this statute, unless the same shall have been or shall be submitted to or acquiesced in for one year after the party interrupted shall have had or shall have notice thereof, and of the person making or authorising the same to be made." **1454.**

Before-mentioned periods to be deemed those next before suits for claims to which such periods relate.

What shall be deemed an interruption.

By s. 6, "in the several cases mentioned in and provided for by this Act, no presumption shall be allowed or made in favour or support of any claim, upon proof of the exercise

Restriction of the presumption to be allowed in support of claims

(a) See *Tapling v. Jones*, 11 H. L. Cas. 290 ; *Glover v. Coleman*, L. R. 10 C. P. 108.

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herein pro-  
vided for.

What time  
to be ex-  
cluded in  
computing  
the terms of  
thirty and  
twenty  
years.

or enjoyment of the right or matter claimed for any less period of time or number of years than for such period or number mentioned in this Act as may be applicable to the case and to the nature of the claim." 1455.

By s. 7, it is provided, "that the time during which any person otherwise capable of resisting any claim to any of the matters before mentioned shall have been or shall be an infant, idiot, non compos mentis, femme covert, or tenant for life, or during which any action or suit shall have been pending, and which shall have been diligently prosecuted, until abated by the death of any party or parties thereto, shall be excluded in the computation of the periods herein before mentioned, except only in cases where the right or claim is hereby declared to be absolute and indefeasible." 1456.

What time  
to be ex-  
cluded in  
computing  
the term of  
forty years.

By s. 8, it is further provided, "that when any land or water upon, over, or from which any such way or other convenient watercourse or use of water shall have been or shall be enjoyed or derived hath been or shall be held under or by virtue of any term of life, or any term of years exceeding three years from the granting thereof, the time of the enjoyment of any such way or other matter as herein last before mentioned, during the continuance of such term, shall be excluded in the computation of the said period of forty years, in case the claim shall within three years next after the end or sooner determination of such term be resisted by any person entitled to any reversion expectant on the determination thereof." 1457.

Title to  
light by  
immemorial  
enjoyment.

Title to the access of light may be made by proof of enjoyment from time immemorial, independently of the stat. 2 & 3 Will. 4, c. 71; for the statute does not take away any of the modes of claiming easements which existed before the Act (a). 1458.

Ways in

A prescription may be lost by neglecting to claim or

(a) *Aynsley v. Glover*, L. R. 10 Ch. Ap. 283.



exercise it for a great number of years (*a*). It may also be lost by unity of possession of as high and perdurable estate in the thing claimed, and in the land out of which it is claimed by such prescription ; because that is an interruption in the right (*b*). And where the subject-matter of a prescription is destroyed, the prescription is lost ; as if the repair of a castle is claimed by a prescription, and the castle is destroyed, the prescription is gone. But an alteration in the quality of the thing to which a prescription is annexed will destroy the prescription : so that if a person prescribes in a *modus decimandi* for the tithes of a park, and the park is disparked, yet the prescription continues ; for it is annexed to the land (*c*). **1459.**

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which a  
prescription  
may be lost.

(*a*) 3 Cruise T. 31, c. 1, § 41.

Litt. 114 b.

(*b*) 3 Cruise T. 31, c. 1, § 35 ; Co.

(*c*) 3 Cruise T. 31, c. 1. § 36, 37.

## TITLE VI.

### OF ADVERSE POSSESSION AND THE OPERATION OF THE STATUTES OF LIMITATION.

#### CHAPTER I.

##### OF ADVERSE POSSESSION AND ITS CONSEQUENCES, UNDER THE OLD LAW.

PART III.  
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Adverse  
possession,  
how ob-  
tained.

1. By abate-  
ment.  
2. By in-  
trusion.

3. By dis-  
seisin.

ADVERSE possession was obtained in five ways :—

1. By abatement, which is a wrongful entry by a stranger, on the death of a person seised of an inheritance, before the heir or devisee enters (*a*). **1460.**

2. By intrusion, one sense of which is a wrongful entry by a stranger, after the determination of a particular estate of freehold, before the remainderman or reversioner enters ; while in another sense it signifies an entry upon the demesnes of the Crown, and taking of the profits thereof (*b*). **1461.**

3. By disseisin, which is the wrongful putting out of him who is seised of the freehold in actual possession. Disseisins of incorporeal hereditaments are only at the election of the party injured, who, for the sake of more easily trying the right, chooses to suppose himself disseised ; for, as there can be no actual dispossession, there cannot be a compulsory disseisin of any incorporeal hereditaments. Hence, where a person has been once seised or possessed of a rent he cannot afterwards be disseised or dispossessed of it, except at his election (*c*). **1462.**

(*a*) Co. Litt. 277 a.

(*b*) Co. Litt. 277 a.

(*c*) 3 Cruise T. 28, c. 2, § 28—30.

A disseisor acquires by the disseisin a tortious fee simple, PART III.  
T. 6, CH. 1. although he claim a less estate; it being a rule that a disseisor cannot qualify his own wrong (a). **1463.**

4. By discontinuance, which, as it existed in more modern times, was a divestment of an estate tail in things lying in livery, and of the estates in remainder or reversion, and a turning of them into rights of action, by a feoffment in fee, in tail, or for the life of the feoffee or another person by a tenant in tail in possession, or a fine by him without proclamations, or a voidable recovery by him (b). To make a discontinuance, the conveyance must be of such an estate as, in its original creation, might by possibility endure beyond the life of the tenant in tail. When the estate so created was at an end, the discontinuance was at an end (c). An estate tail could not be discontinued, unless the remainder or reversion were also discontinued, which they could not be if vested in the Crown (d). **1464.**

A discontinuance cannot now arise, in consequence of the abolition of fines and recoveries by the stat. 3 & 4 Will. 4, c. 74, and the abolition of the effect of warranties (which sometimes worked a discontinuance) (e) by s. 14 of that Act, and the abolition of the tortious operation of feoffments by the stat. 7 & 8 Vict. c. 76, s. 7, and 8 & 9 Vict. c. 136, s. 4, and in consequence of s. 39 of the stat. 3 & 4 Will. 4, c. 27, which provides that no discontinuance happening after December 31st, 1833, shall defeat any right of entry. **1465.**

5. By deforcement. This, in its most extensive sense, signifies the holding of any lands or tenements to which

5. By deforcement

(a) Co. Litt. 296 b, n. 1; see also 180 b, n. 7, 297 a, n. (1).

(b) See 3 Bl. Com. 171; and Co. Litt. lib. 3, c. 11, particularly 325, a b, 326 b, 327 a b, 332 a, n. 1, 336 a, 347 b; *Anderson v. Anderson*, 30 Beav. 209; and see *infra*

on the Operation of Fines and Recoveries.

(c) Co. Litt. 333 a, n. 1; Litt. s. 630.

(d) Co. Litt. 335 a.

(e) Co. Litt. 329 a, 330 a, n. (1).

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another person has a right ; so that it includes as well an abatement, an intrusion, or a disseisin, as any other species of wrong whatsoever, whereby the rightful owner is kept out of possession. But, as contra-distinguished from the former, it is such a detainer of the freehold from the person who had the right of property but never had any possession under that right, as is not an abatement, intrusion, disseisin, or discontinuance : as where escheated lands were withheld from the lord ; or where two persons, as coparceners, have the same title to lands, and one of them enters and keeps out the other ; or where a man seised of lands covenants to convey them to another, and neglects or refuses to do so, and continues possession against him (a).  
**1466.**

Encroach-  
ments.

Encroachments from waste land are a species of disseisin, and, like other acquisitions by wrong, carry the fee, and descend to the heir of the wrong-doer, or, if made by a tenant for life or years, enure to the benefit of the landlord, even though they be separated by a road or a stream, or a narrow strip of land, from the land leased (b). They depend on adverse possession, and the right of entry both of the lord and commoners is barred by [twelve (formerly twenty)] years' possession (c). **1467.**

If a copyhold tenant makes an encroachment upon the waste of a manor, in which there is a custom of granting portions of the waste as copyhold, such encroachment becomes by adverse possession, under the Statutes of Limitation, a copyhold and not a freehold accretion to the original holding (d). **1467a.**

(a) 1 Cruise T. 1, § 27, 29 ; 3 Bl. Com. 174 ; Co. Litt. 277 a, 331 b. and n. (1).

(b) 1 Jarm. & Byth. by Sweet, 78 ; Doe d. Lloyd v. Jones, 15 M. & W. 580 ; Andrews v. Hailes, 2 E. & B. 349 ; Doe d. Croft v. Tidbury, 14 C. B. 304 ; Doe d. Baddeley v. Massey,

17 Ad. & E. (N. S.) 373 ; *Earl of Lisburne v. Davies*, L. R. 1 C. P. 259.

(c) 1 Jarm. & Byth. by Sweet, 77, 78 ; Sugd. Concise View, 274 ; stat. 37 & 38 Vict. c. 57, s. 1, in Appendix.

(d) *Att.-General v. Tomline*, L. R. 5 Ch. D. 750.

No person can be disseised of an undivided part of his estate (a). And a disseisin of the tenant for life is a disseisin of all those in remainder or reversion, and converts their estate to a right of entry; for a disseisin, unless the claim is limited to a particular estate which exists, is always in fee or of the fee (b). **1468.**

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Partial  
disseisin.

Before the stat. 3 & 4 Will. 4, c. 27, the possession of one coparcener was the possession of the other, and the entry of one coparcener generally was accounted in law the entry of both, and no divesting of the moiety of the other (c). And ordinarily the possession and seisin of one tenant in common was the possession and seisin of the other (d). But thirty-six years' sole and uninterrupted possession by one tenant in common, without any account or demand made, or claim set up by his companion, was held a sufficient ground for a jury to presume an actual ouster of the co-tenant (e). **1469.**

Possession of  
coparceners,  
joint  
tenants, and  
tenants in  
common.

The entry of a younger brother was not an abatement, but his possession was deemed to be that of the elder (f). **1470.**

Entry and  
possession of  
a younger  
brother.

By the old law, the effect of a disseisin, per se, was simply to divest the estate of the rightful owner in such a manner as to take away the actual seisin, or seisin in deed, or possession, and convert the estate, from an estate in possession, and clothed with the actual seisin, into an estate vested in interest or right only, and clothed with a constructive seisin or seisin in law, or into a right of entry, as it was called. This effect might be removed, and the actual seisin and possession restored, by an entry or by a claim upon or near the land, in the presence of witnesses, made once in the space of every year and a day, and thence

Effect of  
abatement,  
intrusion,  
disseisin,  
discontinu-  
ance, and  
deforceme-  
nt.

(a) Burton, § 396.

Com. 188.

(b) 2 Pres. Shep. T. 325; Watk. Conv. 3rd ed. by Prest. 74.

(d) 2 Cruise T. 20, § 14.

(e) 2 Cruise T. 20, § 17.

(c) 2 Cruise T. 19, § 7; 2 Bl.

(f) 1 Cruise T. 1, § 28.

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called a continual claim, followed by an action within a year after such entry or claim. In the case of an abatement or intrusion, the rightful owner, that is, the heir, remainderman, or reversioner, has but a constructive seisin or seisin in law prior to and at the time of the abatement or intrusion, and the effect of the abatement or intrusion is to give an adverse possession to the abator or intruder, so as to drive the rightful owner to have recourse to his right of entry or claim and action, as in the case of a disseisin. But if, in the case of lands of freehold tenure, such entry or claim was not made, and the land was suffered to descend immediately to the heir of the abator, intruder, or disseisor (without dower or curtesy interposed), and the rightful owner was under no disability, such as infancy, coverture, unsoundness of mind, imprisonment, or absence beyond the seas, and, in the case of disseisin, five years of peaceable possession by the disseisor himself followed the wrongful act, this descent cast (as it was termed), "toll'd," or took away the right of entry from the rightful owner, and his estate was then divested even of the constructive seisin or seisin in law, and converted into a mere right of action ; but the rightful owner still retained the true right of possession, as well as the right of property or ownership, though the heir of the abator, intruder, or disseisor had an apparent right of possession and the actual ownership, until the result of an action deciding that the property or ownership was in the rightful owner. If no such entry or continual claim was made, followed by an action within the year, the lapse of a period of twenty years after the accrual of the right of entry, even without any descent cast, was sufficient to convert a right of entry into a right of action, but the rightful owner still retained the true right of possession as well as the right of ownership or property, though the abator, intruder, or disseisor had an apparent right of possession and the actual ownership,

until the result of an action deciding that it was in the rightful owner. But the period for entry did not begin to run till all prior estates, including terms of years and other chattel interests, were out of the way. If a certain number of years, which varied from thirty to fifty years, according to the kind of action which might be brought, were suffered to elapse without an action, the right of possession, as well as the actual possession, was lost, and there then remained nothing but a right of property, or a mere right as it was called, as distinguished from a right both of property and of possession. And if sixty years were suffered to elapse without an appropriate action, the ownership altogether ceased; the law no longer allowing the rightful owner to enforce his claim (*a*). **1471.**

It may be here useful to remark, that the being converted into a right of action, as distinguished from a right of entry, is what is generally meant by the estate being "put or turned to a right;" but that expression sometimes signifies the being converted into a right of entry, and at other times into a mere right of property, which, though indeed a right of action, could only be enforced by a *droit*-tural, and not by a possessory action (*b*). **1472.**

Meaning of  
the phrase  
"put to a  
right."

The remedy by entry took place in the case of abatement, intrusion, and disseisin only. Upon a discontinuance or deforcement the owner of the estate had only a right of action (*c*), to which the same observations are applicable, as to the right of action which existed in the case of abatement, intrusion, and disseisin. **1473.**

Where entry  
allowed.

If an owner of freehold land dies intestate, and another

(*a*) Compare 2 Bl. Com. 195—199; 3 Bl. Com. 168—9, 175—180, 196; 1 Cruise T. 29, c. 1, § 3—12, 16, 17; 1 Cruise T. 1, § 20—24; 3 Steph. 480—2; Fearn, 286 & n. (*e*); Burton, c. 1, § 6, particularly § 363—377, 383, 411; see also § 1310; Litt. s. 385—398, 402, 405; Co.

Litt. lib. 3, c. 7; Co. Litt. 237 b, 238 a, n. (1), 239 a, n. (1), 266 b, n. (1).

(*b*) See Co. Litt. 327 b, 332 b, n. (1), 239 a, n. (1); 2 Bl. Com. 197; 3 Steph. Com. 480, n. (*a*).

(*c*) 3 Bl. Com. 175.

**PART III.** person wrongfully enters, devises it to others and dies, and  
**T. 6, CH. 1.** the heiress at law also dies, but having devised to another  
 — “all real estate (if any) of which she might die seised,” she  
 did not become seised in fact or in law, and therefore the  
 property did not pass under her devise (a). **1473a.**

**Descent**  
**does not**  
**strengthen**  
**right, in the**  
**case of copy-**  
**holds.** In the case of copyholds, a descent does not strengthen  
 the right arising from mere possession; by taking away  
 the entry of the more worthy claimant (b). **1474.**

(a) *Leach v. Jay*, L. R. 6 Ch. D.  
 496; 9 Ch. D. (Ap.) 42.

(b) *Burton*, § 1310.



## CHAPTER II.

OF THE STATUTES OF LIMITATION 3 & 4 W. 4, c. 27 (a),  
[and 37 & 38 Vict. c. 57 (b).]

[THE sections of stat. 3 & 4 Will. 4, c. 27, with the ex-  
ception of seven which are repealed, must now be read  
and construed with those of the stat. 37 & 38 Vict. c. 57,  
intituled "An Act for the further Limitation of Actions  
and Suits relating to Real Property," which was passed  
on the 7th of August, 1874, but did not come into opera-

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(a) By s. 1, it is enacted, "that the words and expressions herein-aftermentioned, which in their ordinary signification have a more confined or a different meaning, shall in this Act, except where the nature of the provision or the context of the Act shall exclude such construction, be interpreted as follows: (that is to say,) the word '*land*' shall extend to manors, messuages, and all other corporeal hereditaments whatsoever, and also to tithes (other than tithes belonging to a spiritual or eleemosynary corporation sole), and also to any share, estate, or interest in them or any of them, whether the same shall be a freehold or chattel interest, and whether freehold or copyhold, or held according to any other tenure; and the word '*rent*' shall extend to all heriots, and to all services and suits for which a distress may be made, and to all annuities and periodical sums of money charged upon or payable out of any land (except moduses or compositions belonging to a spiritual or eleemosynary corporation sole); and

*'the person through whom another person is said to claim,'* shall mean any person by, through, or under, or by the act of whom, the person so claiming became entitled to the estate or interest claimed as heir, issue in tail, tenant by the curtesy of England, tenant in dower, successor, special or general occupant, executor, administrator, legatee, husband, assignee, appointee, devisee, or otherwise, and also any person who was entitled to an estate or interest to which the person so claiming, or some person through whom he claims, became entitled as lord by escheat; and the word '*person*' shall extend to a body politic, corporate, or collegiate, and to a class of creditors or other persons, as well as an individual; and every word importing the *singular number* only shall extend and be applied to several persons or things as well as one person or thing; and every word importing the *masculine gender* only shall extend and be applied to a female as well as a male."

Interpretation clause.

(b) See Appendix.

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[tion until the 1st of January, 1879, and enacts by s. 9, "From and after the commencement of this Act all the provisions of the Act passed in the session of the third and fourth years of the reign of his late Majesty King William the Fourth, chapter twenty-seven, except those contained in the several sections thereof next hereinafter mentioned, shall remain in full force, and shall be construed together with this Act, and shall take effect as if the provisions hereinbefore contained were substituted in such Act for the provisions contained in the sections thereof numbered two, five, sixteen, seventeen, twenty-three, twenty-eight, and forty respectively (which several sections from and after the commencement of this Act shall be repealed), and as if the term of six years had been mentioned instead of the term of ten years in the section of the said Act numbered eighteen, and the period of twelve years had been mentioned in the said section eighteen, instead of the period of twenty years." 1475.

General rule  
as to re-  
covery of  
land or rent  
at law.

By s. 1 of stat. 37 & 38 Vict. c. 57, no person shall make an entry or distress, or bring an action or suit, to recover any land or rent, but within twelve years after the right to make such entry or distress or to bring such action or suit first accrued (*a*). The word rent in this section, as in the repealed second section of stat. 3 & 4 Will. 4, c. 27, would seem not to include rents under leases, but to be used in the sense of rent-charge (*b*). 1476.

This section does not operate to prevent the tithe owner from recovering tithes (which by the first section of stat. 3 & 4 Will. 4, c. 27, are included in the expression "land") as chattels, from the occupier just as the repealed second section of the last-mentioned Act did not so operate; but it is confined to cases where there are two parties, each claiming an adverse estate in the tithes. Thus if a person

(*a*) *Sands to Thompson*, L. R. 22 Ch. D. 614.

(*b*) *Grant v. Ellis*, 9 M. & W. 113.

[receives no tithes for twelve years, he cannot recover possession of them from the person who has received them from the true tenant for twelve years (a).] **1477.**

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By s. 3 [of stat. 3 & 4 Will. 4, c. 27] the right of entry, distress, or action, shall be deemed to have accrued, 1. In the case of an estate in possession, (1) on a discontinuance of the possession or of receipt by the person claiming, or by the person through whom he claims; or (2) on the death of the latter where he continued in possession or receipt till that time, and where he was the last person in possession or receipt; or (3) on the accruer of a right of possession or receipt on alienation, where no person has been in possession or receipt by virtue of the conveyance. 2. In the case of a future estate or interest in respect of which no person has obtained possession or receipt, the right shall be deemed to have accrued on the estate falling into possession. 3. In the case of a title by forfeiture or breach of a condition, the right shall be deemed to have accrued on that event. **1478.**

When the  
right shall  
be deemed  
to have  
accrued.

That part of this section which provides that, in the case of reversions or remainders, the right shall be deemed to have accrued at the time when the reversion or remainder became an estate in possession applies only to cases where some other person than the reversioner was entitled to the particular estate (b). [In this section the word rent signifies rent-charge.] **1479.**

Doubts being entertained whether this section comprehended the case of a mortgagee out of possession, it was enacted by the stat. 7 Will. 4 & 1 Vict. c. 28, "That it shall and may be lawful for any person entitled to or claiming under any mortgage of land, being land within the definition contained in the first section of the said Act, to make an entry or bring an action at law or suit

(a) *Dean and Chapter of Ely v. Cash*, 15 M. & W. 617.

(b) *Doe d. Hall v. Moulsdale*, 16 M. & W. 689.

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in equity to recover such land at any time within twenty years next after the last payment of any part of the principal money or interest secured by such mortgage, although more than twenty years may have elapsed since the time at which the right to make such entry or bring such action or suit in equity shall have first accrued, anything in the said Act notwithstanding." [And stat. 37 & 38 Vict. c. 57, s. 9, enacts that "the provisions of this statute shall remain in full force, and be construed together with this Act, as if the period of twelve years had been therein mentioned instead of the period of twenty years."] 1480.

When a remainderman or reversioner shall have a new right.

By s. 4 of the stat. 3 & 4 Will. 4, c. 27, where advantage of forfeiture or breach of condition is not taken by a remainderman or reversioner, he shall have a new right when his estate comes into possession. [And by s. 2 of stat. 37 & 38 Vict. c. 57, fresh provision is made for the case of future estates; and when the person entitled to the particular estate was out of possession or receipt when his interest determined, the time is limited to twelve years from the time when the right first accrued to him, or to six years from the time when the estate of the person becoming entitled in possession, shall be vested in possession, whichever of those two periods shall be the longer. This is substituted for the provisions of the repealed s. 5 of stat. 3 & 4 Will. 4, c. 27. The word rent, in this section, and in s. 4 of the last-mentioned Act, is used in the sense of rent-charge.] 1481.

Accruer of right to an administrator.

By s. 6 [of stat. 3 & 4 Will. 4, c. 27], an administrator shall be deemed to claim as if there had been no interval between the death of the deceased person and the grant of letters of administration. 1482.

Accruer of right in case of a tenancy at will.

By s. 7, the right of entry, distress, or action of a person entitled, subject to a tenancy at will, shall be deemed to have first accrued either at the determination of such tenancy, or at the expiration of one year next after the

commencement thereof. And by s. 8, the right of entry, distress, or action of a person entitled, subject to a tenancy from year to year or for some other period without any lease in writing, shall be deemed to have first accrued at the determination of the first of such years or other periods, or on the last payment of rent, whichever shall last happen. [In s. 7, and the earlier part of s. 8, the word rent is used in the sense of rent-charge; but the words, "rent payable in respect of such tenancy," in the latter part of the eighth section, refer to rent reserved under a lease.] 1483.

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Accrues of right in case of a tenancy from year to year, or for some other period without a lease.

By s. 9, "when any person shall be in possession or in receipt of the profits of any land, or in receipt of any *rent*, by virtue of a lease in writing, by which a rent amounting to the yearly sum of twenty shillings or upwards shall be reserved, and the rent reserved by such lease shall have been received by some person wrongfully claiming to be entitled to such land or *rent* in reversion immediately expectant on the determination of such lease, and no payment in respect of the rent reserved by such lease shall afterwards have been made to the person rightfully entitled thereto, the right of the person entitled to such land or *rent*, subject to such lease, or of the person through whom he claims, to make an entry or distress or to bring an action after the determination of such lease, shall be deemed to have first accrued at the time at which the rent reserved by such lease was first so received by the person wrongfully claiming as aforesaid; and no such right shall be deemed to have first accrued upon the determination of such lease to the person rightfully entitled." [Where the word *rent* is printed in italics, it would seem to be used in the sense of rent-charge; but in the other places in this section it appears to signify rent reserved on a lease (a). Possession by an agent is within this section,

Accrues of right in case of rent wrongfully received.

(a) See the judgment of *Brennan*, C. J., in *Doe d. Angell v. Angell*, 9 Q. B. 356.

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T. 6, CH. 2.

and the receipt for twelve years of rents, through an agent, is sufficient to confer a possessory title. Any claim without title, whether made under a mistake, or designedly, is included in this section (a).] **1484.**

Mere entry  
not to be  
deemed  
possession.  
Continual  
claim.

By s. 10, "no person shall be deemed to have been in possession of any land within the meaning of this Act merely by reason of having made an entry thereon." And by s. 11, "no continual or other claim upon or near any land shall preserve any right of making any entry or distress or of bringing an action." **1485.**

Possession  
of one  
coparcener,  
joint tenant,  
or tenant in  
common.

Possession  
of a younger  
brother or  
relative.

Acknowledgment  
in writing to  
the person  
entitled or  
his agent.

Case of  
possession  
not being  
adverse at  
the time of  
the Act.

By s. 12, the possession of one coparcener, joint tenant, or tenant in common, is not to be deemed the possession of the other or others. And by s. 13, the possession of a younger brother or other relative of the heir is not to be deemed the possession of the heir. **1486.**

By s. 14, an acknowledgment in writing given to the person entitled or his agent is to be equivalent to possession or receipt. **1487.**

By s. 15, where possession was not adverse at the time of passing the Act, the right was not to be barred till the end of five years afterwards, notwithstanding the period of twenty years limited by the Act might have expired. **1488.**

Disabilities.

[By s. 3 of stat. 37 & 38 Vict. c. 57, if a person be under disability of infancy, coverture, idiotcy, lunacy, or unsoundness of mind at the time the first right accrued to him, he and those claiming through him shall have six years from the termination of such disability or his death, whichever shall first happen, notwithstanding the expiration of the period of twelve years (b). But by s. 4, no time is to be allowed for absence beyond seas. And by s. 5, no entry, distress, or action shall be made or brought but within thirty years from the first accruer of the right.

(a) *Williams v. Pott*, L. R. 12  
Eq. 149.

(b) *Hickman v. Upsall*, L. R. 4  
Ch. D. (Ap.) 144.

The provisions of these sections, are substituted for those contained in the repealed sections 16 and 17 of stat. 3 & 4 Will. 4, c. 27. By s. 18 of the last-mentioned Act,] where a person shall have died under disability, no additional time shall be allowed on account of the disability of any other person. And by s. 19, Ireland and other adjacent islands are not to be deemed beyond the seas. [But this section is now obsolete.] **1489.**

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T. 6, CH. 2.

By s. 20 [of stat. 3 & 4 Will. 4, c. 27,] when the right of a person to an estate in possession is barred, his right to any other estate, interest, right, or possibility in the same land or rent is also barred, unless in the meantime such land or rent shall have been recovered by some person entitled to an estate, interest, or right, which shall have been limited or taken effect after or in defeasance of such estate or interest in possession. **1490.**

When the right to an estate in possession is barred, the other rights of the same person shall be barred.

By s. 21, when a tenant in tail is barred, no person whom he might have barred shall recover. And by s. 22, when a tenant in tail dies before the expiration of the period limited for recovering land or rent, no person whom he might have barred shall recover it but within the period during which the tenant in tail himself might have recovered it, if he had continued to live. **1491.**

Bar to a tenant in tail a bar to those whom he might have barred.

Possession adverse to tenant in tail adverse to persons he might have barred.

[By s. 6 of stat. 37 & 38 Vict. c. 57, in case of possession or receipt under an assurance by a tenant in tail, which shall not bar an estate or estates to take effect after or in defeasance of his estate tail, such estate or estates shall be barred at the end of twelve years after that period at which the assurance, if then executed, would have barred such estate or estates (a). This section re-enacts, with alterations, the provisions of the repealed s. 23 of stat. 3 & 4 Will. 4, c. 27.] **1492.**

Other cases where estates to take effect after or in defeasance of estate tail shall be barred.

By s. 24 [of stat. 3 & 4 Will. 4, c. 27,] "after the 31st day of December, 1833, no person claiming any land or

Suits in equity to be brought

(a) *Mills v. Chapel*. L. R. 20 Eq. 92.

PART III.  
T. 4, CH. 2.

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rent in equity shall bring any suit to recover the same but within the period during which by virtue of the provisions hereinbefore contained he might have made an entry or distress or brought an action to recover the same respectively, if he had been entitled at law to such estate, interest, or right in or to the same as he shall claim therein in equity." Charitable trusts are within this section (a). 1493.

Accrual of  
right in  
cases of  
express  
trust.

By s. 25, "when any land or rent shall be vested in a trustee upon any express trust, the right of the cestui que trust, or any person claiming through him, to bring a suit against the trustee, or any person claiming through him, to recover such land or rent, shall be deemed to have first accrued, according to the meaning of this Act, at and not before the time at which such land or rent shall have been conveyed to a purchaser for a valuable consideration, and shall then be deemed to have accrued only as against such purchaser and any person claiming through him." [A security in the form of a trust for sale is a mortgage within the meaning of stat. 37 & 38 Vict. c. 57, s. 7, and is not included in this section (b).] 1494.

Accrual of  
right in  
cases of  
fraud.

By s. 26, in cases of concealed fraud, the right shall be deemed to have accrued when the fraud shall or might with reasonable diligence have been first discovered. 1495.

Jurisdiction  
of equity to  
refuse relief.

By s. 27, "nothing in this Act contained shall be deemed to interfere with any rule or jurisdiction of Courts of Equity in refusing relief on the ground of acquiescence or otherwise to any person whose right to bring a suit may not be barred by virtue of this Act." 1496.

Barring  
mortgagor.

[By s. 7 of stat. 37 & 38 Vict. c. 57, a mortgagor is to be barred at the end of twelve years from the time when the mortgagee took possession, or from the last written

(a) *Magdalen Coll. v. Att.-Gen.*,  
6 H. L. Cas. 189,

(b) *Locking v. Parker*, L. R. 8  
Ch. Ap. 30; 42 L. J. (Ch.) 257.



acknowledgment. This section takes the place of s. 28, PART III.  
T. 6, CH. 2. which is repealed, of stat. 3 & 4 Will. 4, c. 27 (a).] **1497.**

By s. 29 [of stat. 3 & 4 Will. 4, c. 27.] no lands or rents are to be recovered by any ecclesiastical or eleemosynary corporation sole after two incumbencies and six years, or such further time as will make up sixty years from the accruer of the right. [This section applies to the Ecclesiastical Commissioners where a right of action accrues before the property and rights of a deanery are vested in them by stat. 3 & 4 Vict. c. 113, ss. 50, 57; and therefore such actions by them are not governed by stat. 37 & 38 Vict. c. 57, s. 1 (b).] **1498.** Bar to ecclesiastical or eleemosynary corporation sole in regard to land or rent.

By s. 30, no benefice is to be recovered after three adverse incumbencies or such further period as will make up sixty years. But, by s. 31, an incumbency, after promotion to a bishopric, is to be deemed a continuation of the incumbency of the clerk who was made a bishop. By s. 33, however, no benefice is to be recovered after a hundred years' adverse possession. **1499.** Bar to right of presentation or advowson.

By s. 34, "at the determination of the period limited by this Act to any person for making an entry or distress or bringing any writ of quare impedit or other action or suit, the right and title of such person to the land, rent, or advowsons for the recovery whereof such entry, distress, action, or suit respectively might have been made or brought within such period, shall be extinguished." [But see *Markwick v. Hardingham*, L. R. 15 Ch. D. (Ap.) 339.] **1500.** Extinction of the right as well as the remedy.

By s. 35, "the receipt of the rent payable by any tenant from year to year or other lessee, shall, as against such lessee or any person claiming under him (but subject to the lease), be deemed to be the receipt of the profits of the land for the purposes of this Act." **1500a.** Receipt of rent to be deemed a receipt of profits.

(a) *In re Alison, Johnson v.* section.

*Mounsey*, L. R. 11 Ch. D. (Ap.) 284,  
as to what is a mortgage under this

(b) *Ecclesiastical Commissioners  
v. Rome*, L. R. 5 Ap. Cas. 736.

PART III.  
T. 6, CH. 2.Abolition of  
real and  
mixed  
actions,  
except, etc.No descent  
cast, discon-  
tinuance, or  
warranty, to  
defeat a  
right of  
entry or  
action.Bar to  
money  
charged  
upon or  
payable out  
of land, and  
to legacies.

By s. 36, real and mixed actions are abolished, except for dower, quare impedit, and ejectment. 1501.

By s. 39, "no descent cast, discontinuance, or warranty which may happen or be made after the said 31st day of December, 1833, shall toll or defeat any right of entry or action for the recovery of land." 1502.

[By s. 8 of stat. 37 & 38 Vict. c. 57, "no action or suit or other proceeding shall be brought to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon or payable out of any land or rent, at law or in equity, or any legacy, but within twelve years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same, unless in the meantime some part of the principal money, or some interest thereon, shall have been paid, or some acknowledgment of the right thereto shall have been given in writing signed by the person by whom the same shall be payable, or his agent, to the person entitled thereto or his agent; and in such case no such action or suit or proceeding shall be brought but within twelve years after such payment or acknowledgment, or the last of such payments or acknowledgments if more than one, was given." This section applies to the case of a covenant to secure payment of a mortgage debt, and even to a collateral bond for that purpose. It is substituted for the repealed s. 40 of stat. 3 & 4 Will. 4, c. 27; and bars the remedy only, but does not extinguish the right (a).] 1503.

Statutes of  
Limitation  
inapplicable  
to express  
trusts.

It may be stated generally that as between cestui que trust and trustee, in the case of a direct trust, there is no bar, because there is no adverse possession (b). And by

(a) *Sutton v. Sutton*, L. R. 22 Ch. D. (Ap.) 511; *Fearnside v. Flint*, L. R. 22 Ch. D. 579. As to arrears of dower, see *supra*, par. 491; and as to arrears of rent or interest, or

damages in respect of such arrears, see *supra*, par. 83.

(b) *Lewin on Trusts*, 5th ed. 620; *Drummond v. Sant*, L. R. 6 Q. B. 763.

the stat. 36 & 37 Vict. c. 66, s. 25 (2), it is enacted that PART III.  
T. 6. CH. 2. "no claim of a cestui que trust against his trustee for any property held on an express trust, or in respect of any breach of such trust, shall be held to be barred by any Statute of Limitations." [But equity always discountenances laches and delay, and in granting or refusing relief, acts in analogy to the law (a).] **1504.**

[With respect, however, to actions by persons entitled to charges and legacies payable out of land, and secured by express trusts, it is enacted by s. 10 of stat. 37 & 38 Vict. c. 57, that "after the commencement of this Act no action, suit, or other proceeding shall be brought to recover any sum of money or legacy charged upon or payable out of any land or rent, at law or in equity, and secured by an express trust, or to recover any arrears of rent or of interest in respect of any sum of money or legacy so charged or payable and so secured, or any damages in respect of such arrears, except within the time within which the same would be recoverable if there were not any such trust." This does not, like stat. 36 & 37 Vict. c. 66, s. 25 (2), apply as between trustee and cestui que trust; but has reference to the land charged, and the persons entitled to the charge.] **1505.**

By the stat. 23 & 24 Vict. c. 38, s. 13, "after the 31st of December, 1860, no suit or other proceeding shall be brought to recover the personal estate, or any share of the personal estate, of any person dying intestate, possessed by the legal personal representative of such intestate, but within twenty years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same, unless in the meantime some part of such estate or share, or some interest in respect thereof, shall have been accounted for Bar to claims on property of intestates.

(a) *Bright v. Legerton* (No. 1), 29 Beav. 498; *Thomson v. Eastwood*, L. R. 2 Ap. Cas. 215.

PART III.  
T. 6, CH. 2.

or paid, or some acknowledgment of the right thereto shall have been given in writing, signed by the person accountable for the same, or his agent, to the person entitled thereto, or his agent; and in such case no such action or suit shall be brought but within twenty years after such accounting, payment, or acknowledgment, or the last of such accountings, payments, or acknowledgments, if more than one, was made or given." [This was enacted to supplement stat. 3 & 4 Will. 4, c. 27, s. 40, which did not include cases of intestacy. And if, as would appear, s. 8 of stat. 37 & 38 Vict. c. 57 does not extend to such cases, the next of kin will not be barred for twenty years, although an action by a legatee is, under the last-mentioned section, barred in twelve years.] 1506.

## TITLE VII.

OF THE OPERATION OF THE LAND REGISTRY ACT, 1862,  
THE DECLARATION OF TITLE ACT, 1862, AND THE LAND  
TRANSFER ACT, 1875.

AN unimpeachable title or root of title might be obtained in favour of or by a purchaser for value, 1st. By entering the land on "the Register of Estates with an indefeasible Title," and the interests and persons interested on "the Record of Title to Land on the Register." 2ndly. By an order of the Court of Chancery, subject to appeal, vesting the land in a purchaser for value. The order may be qualified, showing that the title is to commence from a certain time. 3rdly. By a transfer, by direction of the Court of Chancery, to "the Register of Estates with an indefeasible Title" (with an entry on "the Record of Title" of the interests and persons interested) of land, which, on proof of a ten years' enjoyment by an owner as of the fee, was previously placed on "the Register of Estates without an indefeasible Title." 4thly. By a final declaration of title by the Court of Chancery. The first three of these modes of obtaining an indefeasible title are under the Land Registry Act, 1862, 25 & 26 Vict. c. 53; the fourth is under the Declaration of Title Act, 25 & 26 Vict. c. 67. **1507.**

PART III.  
TITLE VII.  

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Land  
Registry Act,  
and De-  
claration of  
Title Act.

The title so gained is altogether indefeasible, when land was registered with an indefeasible title. In that case, the title is not subject to be defeated even by a prior interest. But when land was registered without an indefeasible title, interests prior to the registration or to the commencement of the title are not affected. **1508.**

PART III.  
TITLE VII.

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The title so gained might, however, be subject to incumbrances, which were to be registered in "the Register of Mortgages and Incumbrances." And the registrar might in "the Record of Title" specify any exception, qualification, or condition, or reserve a right, or describe an outstanding right or possibility. 1509.

No unregistered estate or contract, for the registration whereof provision was made by the Act, will prevail against the title of a purchaser for value duly registered. The proprietor of any land or charge may direct that no transfer or charge be made of it until notice be sent to some address, or some consent be given or something else be done. But this restraint may be withdrawn or be set aside by a judge of [the Chancery Division of the High Court of Justice]. And also any person interested in any land or charge registered in the name of any other person may lodge a caveat that no disposition be made without notice to the cautioner. 1510.

Land may be removed from the register by consent of all persons interested. 1511.

After registration of any land, every interest created or coming into existence or affecting it, is to be registered in "the Record of Title" or "the Register of Incumbrances." 1512.

Land registered under the Land Registry Act, 1862, may be dealt with or affected, 1st. By a short statutory disposition in a schedule form. 2ndly. By an indorsement on an instrument called the land certificate, which may be obtained by any one named in the record of title as owner of any interest, and which contains a copy of the entries in the register and all other material particulars, and may be compared with and made to correspond with the register from time to time. 3rdly. By a deposit of the land certificate. 4thly. By any instrument by which the land, if

not registered, might have been dealt with or affected (a). **PART III.**  
**1513.** **TITLE VII.**

The stat. 38 & 39 Vict. c. 87, intituled, "An Act to **Land**  
simplify Titles and facilitate the Transfer of Land in **Transfer**  
England," was passed on the 13th of August, 1875, and **Act 1875.**  
called "the Land Transfer Act, 1875." By s. 125 of this  
Act, it is provided that application for the registration of  
any estate under the Land Registry Act, 1862, shall not  
be entertained. And certain substitutionary provisions for  
registration of land are made by this new Act. **1514.**

(a) For further information, the reader is referred to Mr. Edward Nugent Ayrton's most careful, elaborate, and valuable work on these statutes.

## TITLE VIII.

### OF FORFEITURE.

**PART III.  
TITLE VIII.**

**Definition.**

**FORFEITURE** is a loss of real or personal property, as a punishment for some illegal act or negligence of the owner thereof. **1515.**

**Causes of  
forfeiture.**

Before the passing of the stat. 33 & 34 Vict. c. 23 (July 4th, 1870), real and personal estate might be forfeited by crime. **1516.**

**Forfeiture  
for crime.**

By attainder in high treason, a man forfeited for ever to the Crown, all his lands and tenements of freehold tenure, in fee simple, and all his rights of entry on lands and tenements of the same tenure, which he had at the time of the offence committed, or at any time afterwards. And he also forfeited to the Crown the profits of all lands and tenements of the same tenure, which he had in his own right, for life or years, so long as such interest subsisted (*a*). **1517.**

In consequence of the stat. 26 Hen. 8, c. 13, and 33 Hen. 8, c. 20, if tenant in tail in possession, or having a right of entry, was attainted of high treason, the estate tail was barred, and the lands were forfeited to, and immediately vested in, the Sovereign, who thereby acquired a base fee so long as the person attainted lived, or there were heirs of his body who would have been capable of inheriting the estate tail; but upon failure of such heirs, the remainderman or reversioner became entitled (*b*). **1518.**

(*a*) 2 Bl. Com. 290; 4 Bl. Com. § 189.

374; 4 Steph. Com. 495—6; 4  
Cruise T. 32, c. 2, § 36; Burton,

(*b*) 1 Cruise T. 2, c. 2, § 45, 46.



He who was attainted for murder forfeited the benefit of all freehold estates during life ; and after his death, all his freehold land, and tenements in fee simple, but not those in tail, went to the Crown for a year and a day, during which the Crown might commit any manner of waste : but this year, day, and waste, as it was termed, was usually compounded for. After the expiration of the year and a day the property went to the lord by escheat (*a*). 1519.

Forfeiture of lands only arose on attainder, and attainder was caused by a sentence of death, or judgment of outlawry on a capital crime, pronounced for absconding or fleeing from justice (*b*). But the forfeiture related back to the time of the offence, so as to avoid all intermediate charges and conveyances (*c*). 1520.

Forfeiture of the profits of lands for life was incident to misprision of treason; and striking in Westminster Hall, or drawing a weapon upon a judge therein, while the Court [was sitting, were also causes of forfeiture] (*d*). 1521.

Since the stat. 54 Geo. 3, c. 145, he who was attainted of any other felony than high treason and murder, forfeited the profits of all his estates of freehold during his life only (*e*). 1522.

In the absence of any special enactment to the contrary, copyhold estates were forfeited to the lord of the manor, and not to the Crown (*f*). 1523.

When a man committed felony, and then purchased land, and afterwards was attainted, the lord of the fee had it by escheat ; for he had capacity to purchase, but not to hold it. If a man was attainted of felony, he had capacity to purchase to him and his heirs, yet he could not hold it ;

(*a*) 4 Bl. Com. 378—9 ; 2 Bl. Com. 496, 500.  
 Com. 252 ; 4 Steph. Com. 499 ; 1 (*d*) 4 Bl. Com. 379 ; 4 Steph.  
 Cruise T. 2, c. 2, § 42. Com. 501.  
 (*b*) 4 Bl. Com. 374 ; 4 Steph. Com. (*e*) 4 Steph. Com. 499.  
 495. (*f*) 4 Steph. Com. 495 n. ; 1  
 (*c*) 4 Bl. Com. 375 ; 4 Steph. Cruise T. 10, c. 5, § 2.

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but in that case the Sovereign had it by prerogative, and not the lord of the fee, because a man attainted, being *civiliter mortuus*, had only a capacity to purchase for the benefit of the Crown (*a*). 1524.

The forfeiture of chattels accrued on conviction in the higher kinds of offences,—in high treason, misprision of treason, felonies of all sorts, self-murder or felony *de se*, and striking, or drawing a weapon upon a judge in Westminster Hall (*b*). Forfeiture of chattels had no relation backward; so that those only which a man had at the time of conviction were forfeited. But if chattels were only collusively and colourably, not *bonâ fide*, parted with between the offence and the conviction, in such a way that the party, if acquitted, could recover them, or if they were not parted with for valuable consideration, or *bonâ fide*, for a good consideration, they belong to the Crown (*c*). 1525.

By the stat. 5 Geo. 4, c. 84, s. 26, felons whose sentences have been remitted by the governor of the penal colony, are protected in the enjoyment of property subsequently acquired by them, not only by their own industry, but also by other means; as when a felon has subsequently acquired property by becoming one of an ascertained class of next of kin entitled under a will made previous to his conviction (*d*). 1526.

By the stat. 13 & 14 Vict. c. 60, s. 46, re-enacting s. 3 of the stat. 4 & 5 Will. 4, c. 23, it is enacted, that no lands, stock, or chose in action vested in any person upon any trust or by way of mortgage, or any profits thereof,

(*a*) 4 Cruise T. 32, c. 2, § 39; 2 Bl. Com. 290; 2 Pres. Shep. T. 285; Sugd. Concise View, 541; Co. Litt. 2 b.

(*b*) 4 Bl. Com. 379. 380; 4 Steph. Com. 501, 502; *In re Bateman's Trust*, L. R. 15 Eq. 355.

(*c*) 4 Bl. Com. 380—1; 4 Steph. Com. 502; *Perkins v. Bradley*, 1 Hare 219; *Re Saunders's Estate*, 4 Gif. 179.

(*d*) *Gough v. Davies*, 2 K. & J. 623.

shall be forfeited by reason of the attainder or conviction for any offence of such trustee or mortgagee (*a*). **1527.**

By the stat. 33 & 34 Vict. c. 23, the forfeiture of lands and goods for treason and felony is abolished; but certain provisions are made respecting such lands and goods, which may be vested in an administrator or interim curator for the purposes there specified. **1528.**

Property may still be forfeited—

I. By wrongful conduct as regards tenure.

II. By alienation contrary to law.

III. By non-presentation to a benefice; in which case the forfeiture is denominated a lapse.

IV. By simony.

V. By non-performance of conditions.

VI. By breach of copyhold customs (*b*). **1529.**

I. If tenant for life, in a Court of record, disclaims to hold of his lord, or affirms or impliedly admits the reversion to be in a stranger, it is a forfeiture (*c*); and so if in a Court of record a tenant for life claims any greater estate than was granted to him, it is a forfeiture. Hence, although a fine of things lying in grant had no greater effect, as to the interest which it passed, than a grant, yet a fine by tenant for life of such tenements, without any expressions restricting its operation to such an estate as he might lawfully pass, caused a forfeiture. So, if any tenant for life accepted such an unqualified fine from a stranger, he (the conusee) incurred a forfeiture (*d*). **1530.**

I. Forfeiture by wrongful conduct as regards tenure.

II. Lands and tenements may be forfeited by an alienation of them contrary to law; that is, by alienation in mortmain, alienation to an alien, or wrongful alienation by particular tenants (*e*). **1531.**

II. Forfeiture by unlawful alienation.

(*a*) See *supra*, par. 1433.

(*b*) 2 Bl. Com. 267.

(*c*) 1 Cruise T. 3, c. 1, § 38; 2 Bl. Com. 276; Co. Litt. 252 a.

(*d*) Burton, § 745; Co. Litt. 251

b.

(*e*) 2 Bl. Com. 267.

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## 1. Alienation in mortmain.

1. Alienation in mortmain (in mortuâ manu) is an alienation of lands or tenements to any corporation, sole or aggregate, ecclesiastical or temporal (*a*). Any such corporations may purchase lands, yet, unless they have a licence to hold in mortmain, they cannot retain such purchase, but it shall be forfeited to the lord of the fee (*b*). 1532.

It is provided by the stat. 7 & 8 Will. 3, c. 37, that the Crown may grant licences to alien or take in mortmain (*c*). And, by various statutes, exemptions have been created in favour of the Church and of certain charities, etc. (*d*). 1533.

## 2. Alienation to an alien.

2. Alienation to an alien was a cause of forfeiture to the Crown of the lands so alienated (*e*). 1534.

## 3. Alienation by particular tenants.

3. Alienations by persons not having an estate of inheritance, when they are greater than the law entitles them to make, are in certain cases forfeitures to him whose right is attacked thereby (*f*). Thus, if a tenant in tail after possibility of issue extinct (*g*), or a tenant by the curtesy, or tenant for life made a feoffment to a stranger in fee, or in tail, or for the life of the feoffee, or levied a fine without proper words of restriction, or suffered a recovery, it was a forfeiture, unless the person in remainder or reversion in fee was a party to the assurance, or confirmed the estate (*h*). If baron and femme, tenants for life, made a feoffment, this was a forfeiture during the coverture, but not against the wife after her husband's death (*i*). But as a grant, lease

As by tenants in tail after possibility of issue extinct, or by the curtesy, or for life;

(*a*) 2 BL Com. 268; Co. Litt. 2 b.

(*b*) 2 BL Com. 290—1; Co. Litt. 2 b.

(*c*) 2 BL Com. 373; 1 Cruise T. 1, § 37; Co. Litt. 99 a, n. (1).

(*d*) See Stamp's Index to the Statute Law, tit. "Mortmain." And as to "The Mortmain Act," see *supra*, par. 732 et seq.

(*e*) 2 Pres. Shep. T. 232, n. 12.

On Aliens, see *infra*, Part IV. T. 1, Ch. 7.

(*f*) 2 BL Com. 274; 1 Steph. Com. 443—445.

(*g*) 1 Cruise T. 4, § 9.

(*h*) 1 Cruise T. 3, c. 1, § 33—37; and T. 5, c. 2, § 31; Co. Litt. 233 b, & n. (1), 251, a b; Burton, § 740 n, 741, 744, 746.

(*i*) 1 Cruise T. 3, c. 1, § 35.

for years, bargain and sale, or lease and release, only passed what lawfully might pass, by these no forfeiture could be incurred (*a*). **1535.**

The Statute of Gloucester (6 Edw. 1, c. 7) provides, that, upon the alienation, in fee or for life, of a tenant in dower, she shall forfeit her estate (*b*). And by the stat. 11 Hen. 7, c. 20 (confirmed by the stat. 32 Hen. 8, c. 36, s. 2), if a woman who had an estate in dower, or for life, or in tail, jointly with her husband, or to herself, or her use, in any hereditaments of the inheritance or purchase of her husband, or given to the husband and wife in tail or for life by any of the ancestors of the husband or by any one seised to the use of the husband or of his ancestors, and being sole, or with any other after-taken husband, discontinued, aliened, released, or confirmed with warranty, or by covin suffered a recovery thereof, such recovery, discontinuance, alienation, release, confirmation, and warranty were void, and the person or persons to whom, after the decease of the woman, the hereditaments would otherwise have belonged, might enter at once, and the woman was barred during the coverture, if married, or altogether if sole, unless he or they concurred by some instrument recorded or enrolled, or unless the alienation were for the woman's life only. But by s. 17 of the stat. 3 & 4 Will. 4, c. 74, this enactment is repealed, except as to lands in settlement before the Fines and Recoveries Act. **1536.**

And if a tenant for years attempted to create a greater interest than he lawfully could, by a mode of conveyance which divested the estate in remainder or reversion, it would operate as a forfeiture of his estate (*c*), unless the remainderman or reversioner was a party to the conveyance (*d*). **1537.**

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or by a tenant in dower, or a woman seised for life or in tail of an estate of the gift of her husband, etc.,

or by tenant for years.

(*a*) Burton, § 740 ; Co. Litt. 233, b, n. (1) ; 251, n b.

(*b*) 1 Cruise T. 6, c. 2, § 98.

(*c*) 1 Cruise T. 8, c. 2, § 46.

(*d*) 1 Cruise T. 8, c. 2, § 49.

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Third  
persons  
saved from  
effect of  
forfeiture.

III. Lapse  
or forfeiture  
by non-pre-  
sentation to  
a benefice.

In case of forfeitures by particular tenants, all estates and charges lawfully created by them before the forfeitures are good (*a*). 1538.

III. Lapse is a species of forfeiture, whereby the right of presentation to a church accrues to the ordinary by the neglect of the patron to present ; to the metropolitan, by the neglect of the ordinary ; and to the Crown by the neglect of the metropolitan (*b*). The term in which the title to present by lapse accrues from the one to the other successively is six calendar months from the time of avoidance, exclusive of the day of the avoidance, or from the time when the patron had notice of the avoidance. But as the patron has the permanent right and interest in the advowson, and the presentation is only given to the other persons on account of his negligence, if he presents before the bishop or archbishop has filled up the benefice, though after the six months are elapsed, his presentation is good. But the patron cannot present when the presentation has lapsed to the Crown : for nullum tempus occurrit regi (*c*). In the case of an advowson donative, no lapse occurs by the non-presentation by the patron within six months ; but the ordinary may compel the patron to present, by means of ecclesiastical censures (*d*). 1539.

IV. For-  
feiture for  
simony.

IV. By simony (*e*) the right of presentation to a living is forfeited, and vested pro hac vice in the Crown. 1540.

V. For-  
feiture by  
non-per-  
formance of  
conditions.

V. Where an estate is subject to a condition subsequent, if such condition is not performed, the estate becomes forfeited and returns to the grantor. Where, however, a lessor accepts rent after a breach of a condition against alienation or carrying on a trade, it is a waiver of the forfeiture, and a confirmation of the lease,

(*a*) 2 Bl. Com. 275 ; Burton, § T. 21, c. 2, § 10, 12, 16.  
739, n.

(*d*) 3 Cruise T. 21, c. 2, § 17.

(*b*) 2 Bl. Com. 276.

(*e*) See *infra*, Part III. T. 12,

(*c*) 2 Bl. Com. 276—7 ; 3 Cruise

Ch. 6. § 4, No. XIII.

provided he had notice of the breach, but not otherwise (a). PART III.  
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**1541.**

VI. In addition to the forfeitures to which copyhold estates are liable in common with freeholds, copyholds are also subject to peculiar forfeitures annexed to this species of tenure (b). Alienations made by the tenants of particular estates in customary property, as they do not divest the estates of the persons in remainder or reversion, so they have not the effect of forfeiture for their benefit (c). Yet every alienation which is contrary to the nature of the customary tenure is a ground of forfeiture of the estate to the lord (d). If, however, a copyholder executes a deed of bargain and sale, it amounts only to the creation of a trust, and not to any attempt to dispose of the customary estate (e). And a mere covenant or agreement for a lease will not operate as a forfeiture (f). And so a covenant, which if it related to freehold lands, would have the effect of an immediate lease, may be construed as an undertaking only for a future lease of copyholds. But by a lease without licence for more than one year (unless the custom authorises the creation of a longer term) a like forfeiture is incurred as by any other conveyance (g). VI. Forfeiture by breach of copyhold customs.  
  
Alienations contrary to the custom.  
**1542.**

Every species of waste, whether voluntary or permissive, Waste not warranted by the custom of the manor, will operate as a forfeiture of a copyhold (h). **1543.**

If a copyholder disclaims tenure, or if he refuses to perform the services, after particular warning to himself or general warning within the parish, he thereby forfeits Disclaimer or refusal to perform the services.

(a) 4 Cruise T. 31, c. 5, § 81—83 ;  
*Bridges v. Longman*, 24 Beav. 27 ;  
*Walron v. Hawkins*, L. R. 10 C. P.  
342, and see Addison on Contracts,  
8th ed. p. 260.

(b) 2 Bl. Com. 282.

(c) Burton, § 1330.

(d) Burton, § 1331 ; 1 Cruise

T. 10, c. 5, § 5 ; Co. Litt. 59 a.

(e) Burton, § 1333.

(f) 1 Cruise T. 10, c. 5, § 13—16.

(g) Burton, § 1334 ; 1 Cruise T.  
10, c. 5, § 8 ; Co. Litt. 59 a.

(h) 1 Cruise T. 10, c. 5, § 17 ; Co.  
Litt. 63 a, & n. (1).

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his copyhold, unless he is prevented from attending by sickness (a). 1544.

Refusal to  
pay a fine.

Refusal to pay a fine certain on admittance, or a fine uncertain within a convenient time appointed by the lord, is a forfeiture, unless, in the case of an uncertain fine, payment is refused on the ground that more is demanded than is warranted, and such is the fact (b). 1545.

Refusal to  
pay rent.

Refusal to pay rent due by the custom is a forfeiture, if made on the ground that the lord is not entitled to the rent (c). 1546.

Refusal to  
be admitted.

Where copyholds are descendible, and are not devised, the heir is bound, on the death of his ancestor, to come to the lord's court and require to be admitted. If he neglects to appear within the time prescribed by the custom, a proclamation is made for him to come in and be admitted. If he does not then appear, further proclamations are made at the two or three next courts, according to the custom. And if he does not appear immediately after the last proclamation, the lord may seize the copyhold as forfeited (d). If, however, the heir of a copyholder is beyond sea at the time of his ancestor's death, or within age, or non compos mentis, or in prison, his non-appearance at the lord's court to be admitted will not amount to a forfeiture (e). And there must be a particular custom to warrant the absolute forfeiture of a copyhold by the mere non-appearance of the heir to be admitted. By the general custom, the lord is only authorised to seize the land until the tenant comes in to be admitted (f). 1547.

The non-appearance of a devisee to be admitted operates in general as a forfeiture of the copyhold (g). 1548.

## Forfeiture

An infant at the age of fourteen may forfeit his

(a) 1 Cruise T. 10. c. 5, § 19, 20. 4, § 2.  
23.

(b) 1 Cruise T. 10. c. 5, § 25—6.

(c) 1 Cruise T. 10. c. 5, § 27.

(d) 1 Cruise T. 10. c. 5, § 30, c.

(e) 1 Cruise T. 10. c. 5, § 31.

(f) 1 Cruise T. 10. c. 5, § 33.

(g) 1 Cruise T. 10. c. 5, § 39.



copyhold, not by offences proceeding from negligence or ignorance, but by such as proceed from contempt (a). PART III.  
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by an infant.  
**1549.**

If a copyholder makes a feoffment of one acre of his copyhold, all his estate is not forfeited, but only that acre. But if a copyholder cuts down a tree which grows upon an acre of land parcel of the copyhold, this is a forfeiture of all the copyhold, because the trees are to be employed in building and reparation of the houses (b). **1550.** Extent of  
forfeiture.

The lord pro tempore, even though he may be only a lessee for years, may take advantage of a forfeiture (c). Lord pro  
tempore  
may enforce  
forfeiture.  
**1551.**

Forfeitures may be dispensed with by any subsequent act of the lord acknowledging the person to be his tenant, provided the lord cannot well be supposed to be ignorant of the act amounting to the forfeiture (d). **1552.** Dispensa-  
tion with  
forfeiture.

Also where there are equitable circumstances, a Court of Equity will sometimes relieve against unreasonable forfeitures (e). **1553.** Relief  
against  
forfeiture.

[And with respect to forfeiture of leases (other than forfeiture on non-payment of rent, or on breach of a covenant or condition against alienation, bankruptcy, or execution, and, in case of a mining lease, for inspection), relief against forfeiture will now be granted, unless notice has been given requiring the lessee to remedy the particular breach complained of, if it is capable of remedy, and, in any case, requiring the lessee to make compensation in money for the breach, and the lessee fails, within a reasonable time, to remedy the breach, if capable of remedy, and to make reasonable compensation in money to the satisfaction of the lessor. Also, where a lessor is proceeding to enforce his right of entry or forfeiture, the Restriction  
on and  
relief against  
forfeiture of  
leases.

(a) 1 Cruise T. 10, c. 5, § 41.

(d) 1 Cruise T. 10, c. 5, § 50.

(b) 1 Cruise T. 10, c. 5, § 47.

(e) 1 Cruise T. 10, c. 5, § 59, 63;

(c) 1 Cruise T. 10, c. 5, § 56, 57. Co. Litt. 63 a. n. 2.

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lessee may, in the lessor's action (if any), or in any action by himself, apply to the Court for relief; and the Court may either refuse, or grant relief on such terms, as, under the circumstances of each case, it thinks fit. A wide signification is given to the word lease; and this restriction applies without reference to the date of the commencement of the lease, and notwithstanding any stipulation to the contrary; and even although the provision under which the right of re-entry or forfeiture accrues, is inserted in the lease in pursuance of the directions of any Act of Parliament (a).] 1553a.

(a) Stat. 44 & 45 Vict. c. 41, s. 14 in Appendix *Quilter v. Mapleson*.  
L. R. 9 Q. B. D. (Ap.) 672.

# TITLE IX.

## OF BANKRUPTCY.

### CHAPTER I.

OF BANKRUPTCY UNDER THE STATUTES OF 1849 AND 1861.

PRIOR to the Act of 1869, the statutory Law of Bankruptcy depended principally on two statutes—the Bankrupt Law Consolidation Act, 1849, 12 & 13 Vict. c. 106, and the Bankruptcy Act, 1861, 24 & 25 Vict. c. 134. **1554.**

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Two great  
Bankruptcy  
Acts prior to  
the Act of  
1869.

Until the latter of these statutes, there were two distinct Courts, which were exclusively occupied in adjusting the affairs of persons who were unable to meet their pecuniary engagements; namely, the Court of Bankruptcy, and the Court for the Relief of Insolvent Debtors. The former took cognisance of the affairs of traders; the latter of non-traders. **1555.**

Formerly  
two Courts  
for adjust-  
ing affairs of  
debtors.

The law applicable to traders depended on the Bankruptcy Acts. The law applicable to non-traders, on the Insolvency Acts, 1 & 2 Vict. c. 110; 5 & 6 Vict. c. 116; 7 & 8 Vict. c. 96; 7 & 8 Vict. c. 70. **1556.**

By the Bankruptcy Act, 1861, the latter Court was abolished, and traders and non-traders are alike subjected to the jurisdiction of the Court of Bankruptcy. **1557.**

Abolition of  
Insolvent  
Debtors'  
Court.

[By s. 142 of the stat. 12 & 13 Vict. c. 106, when any person was adjudged a bankrupt, all real estate, except copy or customaryhold, to which he was entitled, and all interest to which he was entitled in such real estate, and of which he might have disposed, and all such real estate

Real estate  
vested in  
assignees.

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[as he might obtain by purchase, descent, or devise, etc., before he obtained his certificate, and all deeds, papers, and writings, respecting the same, became absolutely vested in the assignees for the benefit of his creditors, without any deed of conveyance. 1558.

As to copy-  
holds and  
customary  
lands of  
bankrupt.

By the stat. 24 & 25 Vict. c. 134, s. 114, the Court had power to dispose, for the benefit of the creditors, of the copyhold or customary land of the bankrupt, and to make an order vesting the land or such estate or interest as he had therein, in such person and in such manner as the Court thought fit. 1559.

Life estate  
in remain-  
der, etc.

By s. 115 of the same statute, where a bankrupt non-trader was entitled to a life estate in remainder expectant upon the death or deaths of any previous tenant or tenants for life, with any remainder over to the bankrupt's issue, or the heirs of his body or any of them, as purchasers, the life estate of the bankrupt non-trader could not be sold before it fell into possession, except by an express direction of the Court.] 1560.

Option of  
assignees to  
take or  
renounce  
property.

Assignees of a bankrupt were not bound to take property of the bankrupt, which, so far from being valuable, would be a charge to the creditors; but they might make their election. If, however, they did elect to take the property, they could not afterwards renounce it because it turned out to be a bad bargain (a). 1561.

Provision  
for the case  
of onerous  
property.

[By the stat. 12 & 13 Vict. c. 106, onerous freehold or leasehold property of the bankrupt might be either accepted or declined by the assignees, or might be disposed of on application to the Court (s. 145). 1562.

Provision  
for the case  
of assignees  
not electing  
either to  
abide by or  
abandon any  
agreement  
for purchase  
of real  
estate.

If the bankrupt had entered into any agreement for the purchase of any estate or interest in land, and the assignees did not (upon being thereto required) elect whether to abide by or abandon the agreement, in that case the Court, upon the application of the vendor, might order

(a) Sugd. Concise View, 46.

[them to deliver up the agreement, and the possession of the premises, or might make such other order as the Court thought fit (s. 146). **1563.**

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If the bankrupt had granted, conveyed, assured, or pledged any real or personal estate, or deposited any deeds, upon condition or power of redemption at a future day, by payment of money or otherwise, the assignees might, before the time of the performance of such condition, make tenders or payment, or other performance, as fully as the bankrupt might have done; and thereupon such real or personal estate might be disposed of for the benefit of the creditors (s. 149). **1564.**

Estates granted by a bankrupt subject to a condition or proviso for redemption.

When any person was adjudged a bankrupt, all his personal estate and effects, present and future, and all property which he might purchase, or which might come to him before he obtained his certificate, and all debts due or to be due to him, and the property, right, and interest in such debts became absolutely vested in the assignees, for the benefit of the creditors of the bankrupt, by virtue of their appointment (s. 141). **1565.**

Personal estate vested in assignees.

Where, at the time of the bankruptcy, or before his discharge, the bankrupt's wife had a chose in action, it passed to the assignees, unless she survived her husband, even though he died before it ceased to be reversionary. The reason was, that, on the marriage, the husband had an inchoate and inceptive right in it; though, on principle, that would not seem to have been within the terms of the 141st section of the statute 12 & 13 Vict. c. 106, or the corresponding terms in the 63rd section of the former Consolidation Act, 6 Geo. 4, c. 16 (a). **1566.**

By s. 147 of stat. 12 & 13 Vict. c. 106, all powers

Powers for

(a) *Ripley v. Woods*, 2 Sim. 165; 524 (V.-C. W.); *Pierce v. Thornely*, 2 Sim. 167; 1 Bright's Husb. & Wife, 79—83.  
*Harpur v. Ravenhill*, Tamlyn 144;  
*Drew v. Long*, 22 Law J. 717 (V.-C. K.); *Re Tyler's Trusts*, 4 W. R.

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bankrupt's  
benefit  
might be  
executed by  
assignees.

Goods in  
possession,  
etc., of bank-  
rupt might  
be disposed  
of under the  
bankruptcy.

[vested in any bankrupt which he might legally execute for his own benefit (except the right of nomination to any vacant ecclesiastical benefice) might be executed by the assignees for the benefit of the creditors, in such manner as the bankrupt might have executed the same. 1567.

By s. 125, if any bankrupt, by the consent and permission of the true owner, had in his possession, order, or disposition, any goods or chattels whereof he was reputed owner, or whereof he had taken upon him the sale, alteration, or disposition, as owner, the Court had power to order the same to be sold and disposed of for the benefit of the creditors under the bankruptcy. 1568.

This section extended to goods which were in the order or disposition of a bankrupt at the time of his committing any act of bankruptcy capable of supporting an adjudication, although such act was prior to the act on which the adjudication was founded (a).] 1569.

The words "goods and chattels" comprised all personal estate whatever. So that if a bankrupt continued the sole registered proprietor of a newspaper, and nothing was done to make it apparent that he was not the sole owner, the doctrine of reputed ownership applied to the newspaper (b). 1570.

Where B. assigned his reversionary interest in a fund in Court to T., who obtained the common stop order, and T. afterwards mortgaged this interest to H., but H. did not obtain any stop order, and then T. became bankrupt before the reversionary interest came into possession; it was held by the Lords Justices (reversing the decision of the Court below) that it passed, under this section, to his assignees, free from the mortgage; though T. had acted as solicitor of H. in the mortgage transaction, and H. relied on his

(a) *Stansfield v. Cubitt*, 2 D. & J. 222.

D. & J. 230; Tudor on M. L. 400; *Cooke v. Hemming*, L. R. 3 C. P.

(b) *Ex parte Foss, Re Baldwin*, 2

334.

doing whatever was necessary to perfect the security, and though B. knew of the mortgage, B. not being a trustee of the fund (a). In order to take property out of the order and disposition of the bankrupt, his mortgagee or assignee must have done all that he could reasonably do to perfect his security, whether by stop order, notice, or otherwise, as the case might be (b), unless he had no knowledge nor means of knowing of the bankrupt's interest (c). 1571.

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Where traders mortgaged a leasehold factory, and were allowed to retain possession of the machinery, and became bankrupt, the moveable machinery passed to the assignees, but the machinery fixed to the freehold did not, though mortgaged separately (d). 1572.

The bankrupt's earnings by his personal labour after the bankruptcy, property belonging to him as trustee for others, any office he held which could not legally be sold, his right of nomination to a vacant ecclesiastical benefice, his military pay under the Crown, and his military pension under the East India Company, were not at all affected by his bankruptcy (e). 1573.

What property was not affected by the bankruptcy.

The title of the assignees commenced from the period when the debtor committed an act of bankruptcy. And therefore, though nothing passed out of the bankrupt until the transfer was actually made by an appointment of assignees under the bankruptcy, yet that transfer, when made, operated by relation from the act of bankruptcy, so as to include in general all property belonging to the bankrupt at that time, or at any intermediate time down to the time of transfer, and consequently to overreach and annul, subject to the qualifications presently mentioned, all inter-

Commencement of the title of the assignees. Retrospective operation of the transfer to the assignees.

(a) *Bartlett v. Bartlett*, 1 D. & J. 127.

(b) *Id.*, and *Day v. Day*, 23 Beav. 391; 1 D. & J. 144; *Ex parte Boulton*, 1 D. & J. 163.

(c) *Re Rawbone's Trust*, 3 K. & J. 476.

(d) *Whitmore v. Empson*, 23 Beav. 313; see also *Shuttlenorth v. Herniman*, 1 D. & J. 322.

(e) 2 Steph. Com. 158.

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vening alienations and executions (a). And s. 126 of the stat. 12 & 13 Vict. c. 106 [provided against dispositions of property, except for valuable consideration, during insolvency, but before bankruptcy.] 1574. But,

1. Where a trader was adjudged bankrupt without the filing of a petition by a creditor, the bankruptcy had no relation back to any act done by the bankrupt prior to the adjudication (b). 1575.

2. The transfer did not operate retrospectively, as to the legal estate in the bankrupt's freeholds (c). 1576.

3. The Crown was not affected by this relation: for if after the act of bankruptcy committed and before the assignment of the effects, an extent issued for the debt of the Crown, the goods were bound thereby (d). 1577.

What trans-  
actions not  
affected by  
bankruptcy.

4. [By s. 133 of stat. 12 & 13 Vict. c. 106, all payments really and bonâ fide made by any bankrupt, before the date of the fiat or the filing of a petition for adjudication, and all payments really and bonâ fide made to any bankrupt before, and all conveyances by any bankrupt bonâ fide made and executed before, and all contracts, dealings, and transactions by and with any bankrupt really and bonâ fide made and entered into before, and all executions and attachments against the lands and tenements of any bankrupt bonâ fide executed by seizure, and all executions and attachments against the goods and chattels of any bankrupt bonâ fide executed and levied by seizure and sale before the date of the fiat or the filing of such petition, were deemed to be valid, notwithstanding any prior act of bankruptcy by such bankrupt, provided the person so dealing with or paying to or being paid by such bankrupt, or at whose suit or on whose account such execution or attachment had issued, had not at the time of

(a) 2 Steph. Com. 159, 160.

(c) 2 Steph. Com. 160, n. (c).

(b) *Monk v. Sharp*, 2 Hurl. & Norm. 540.

(d) 2 Steph. Com. 161.



[such payment, conveyance, contract, dealing, or transaction, or at the time of so executing or levying such execution or attachment, or at the time of making any sale thereunder, notice of any prior act of bankruptcy by him committed. 1578.] PART III.  
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5. By s. 134 of the same statute, no purchase from any bankrupt *bonâ fide* and for valuable consideration, where the purchaser *had* notice at the time of the purchase, of an act of bankruptcy, could be impeached, unless a fiat or petition for adjudication had been sued out or filed within twelve months after the act of bankruptcy.] 1579.

A fraudulent transfer of property by a trader or non-trader, with intent to defeat or delay creditors, is an act of bankruptcy (a). 1580. Fraudulent  
transfers of  
property.

A sale or mortgage by a trader or a non-trader, to a *bonâ fide* purchaser or mortgagee for a reasonable sum was not an act of bankruptcy (b). 1581.

But—1. Any transfer which was fraudulent within the meaning of the stat. 13 Eliz. c. 5, was also fraudulent and an act of bankruptcy under the Bankruptcy Acts. 2. Any conveyance to a creditor, by a trader or non-trader, of his *whole property*, or of the whole with an exception only nominal, in consideration of a bygone and pre-existing debt, was fraudulent under the Bankruptcy Acts, and an act of bankruptcy, even though for the benefit of all his creditors, unless they all assented to the deed, or it came within the protection of the Act of 1849, s. 68, or the Act of 1861, ss. 192—194. 3. A transfer by a trader or non-trader of *part* of his property to a creditor, in consideration of a bygone and pre-existing debt, though not fraudulent within the statutes of Elizabeth, was fraudulent and an act of bankruptcy within the Bankruptcy Acts, if made *voluntarily and*

(a) Act of 1849, s. 67; Act of 1861, s. 70. 75, 89, 608; 1 Doria & Macrae, 152.

(b) Deacon, 3rd ed., by Langley,

SECRET

1. The first of these is the fact that the United States is a country of immigrants. The vast majority of the population of the United States is descended from immigrants from other countries. This fact has had a profound influence on the development of the United States. The immigrants have brought with them their own languages, customs, and traditions, which have been blended into the American culture. This has resulted in a unique American identity that is a mixture of many different cultures.

[illegible][illegible]

1. The first step in the process is to identify the problem or issue that needs to be addressed. This involves gathering information and understanding the context of the problem.

[By s. 143 provision was made for the registration of the appointment of the assignees in certain cases.] 1586.

The policy of the law does not permit property to be so limited that it shall continue in the enjoyment of the bankrupt notwithstanding his bankruptcy or insolvency (a). [An annuity or other life interest in real or personal property could not be preserved from assignees on bankruptcy, insolvency, or alienation, in any other way than by a limitation or proviso for its cesser, or a gift over to some other person (b). So that an annuity would pass on the annuitant's bankruptcy to his assignees, notwithstanding a direction that it should not be liable to his debts, but that it should be paid into his hands only, and that his receipts only should be a good discharge (c). And in the absence of a gift over on bankruptcy, the assignees would be entitled even to property of which trustees had the absolute discretion given them to pay or not to pay the income to the person who afterwards became bankrupt, so that he should not have any right thereto other than the trustees should think proper, and so that no creditor should have any claim thereon (d). But where the trust was, that the trustees should receive the income, and pay and apply the same to and for the maintenance and support of a person, his wife, and children, if any, or otherwise as they should think proper, on the bankruptcy of such person, the assignees would take so much only of the income as was not required for the proper maintenance of the wife and children (e).] 1587.

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Registration of appointment of assignees.  
Limitation of property to be enjoyed notwithstanding bankruptcy.  
Cesser of life interest on bankruptcy, insolvency, or alienation.

(a) 2 Jarm. Wills, 2nd ed. 17;  
*Graves v. Dolphin*, 1 Sim. 66.

(c) *Graves v. Dolphin*, 1 Sim. 66.

(d) *Snowdon v. Dales*, 6 Sim. 524.

(b) 2 Spence's Eq. Jur. 89, 90; 2  
Jarm. Wills, 2nd ed. 24, 30.

(e) 2 Spence's Eq. Jur. 90; 2  
Jarm. Wills, 2nd ed. 24.

## CHAPTER II.

## OF BANKRUPTCY UNDER THE STATUTE OF 1869 (a).

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By this statute (which is entitled "An Act to consolidate and amend the Law relating to Bankruptcy," and the short title of which is "The Bankruptcy Act, 1869 ") the following enactments [were] made :—

Effect of  
order of  
adjudica-  
tion.

"When an order has been made adjudging a debtor bankrupt, herein referred to as an order of adjudication, the property of the bankrupt shall become divisible amongst his creditors in proportion to the debts proved by them in the bankruptcy; and for the purpose of effecting such division the Court shall, as soon as may be, summon a general meeting of his creditors, and the creditors assembled at such meeting shall appoint some fit person, whether a creditor or not, to fill the office of trustee of the property of the bankrupt" (s. 14). 1588.

Devolution  
of property  
on the  
registrar,

and then on  
a trustee.

"Until a trustee is appointed the registrar shall be the trustee for the purposes of this Act, and immediately upon the order of adjudication being made the property of the bankrupt shall vest in the registrar. On the appointment of a trustee the property shall forthwith pass to and vest in the trustee appointed" (s. 17). 1589.

Appoint-  
ment of  
trustee.

"The appointment of a trustee shall be reported to the Court, and the Court, upon being satisfied that the requisite security has been entered into by him, shall give a certificate declaring him to be trustee of the bankruptcy named in the certificate, and such certificate shall be con-

(a) For further information on this subject, the reader is referred to the author's "Manual on Bankruptcy."

clusive evidence of the appointment of the trustee, and such appointment shall date from the date of the certificate. When the registrar holds the office of trustee, or when the trustee is changed, a like certificate of the Court may be made declaring the person therein named to be trustee, and such certificate shall be conclusive evidence of the person therein named being trustee" (s. 18). 1590.

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"The creditors may, if they think fit, appoint more persons than one to the office of trustee, and where more than one are appointed they shall declare whether any act required or authorised to be done by the trustee is to be done by all or any one or more of such persons, but all such persons are in this Act included under the term 'trustee,' and shall be joint tenants of the property of the bankrupt. The creditors may also appoint persons to act as trustees in succession in the event of one or more of the persons first named declining to accept the office of trustee" (s. 83). 1591.

"If any vacancy occur in the office of trustee by death, resignation, or otherwise, the creditors in general meeting shall fill up such vacancy, and a general meeting for the purpose of filling up such vacancy may be convened by the continuing trustee, if there be more than one, or by the registrar on the requisition of any creditor" (s. 83). 1592.

"If, through any cause whatever, there is no trustee acting during the continuance of a bankruptcy, the registrar of the Court for the time being having jurisdiction in the bankruptcy shall act as such trustee" (s. 83). 1593.

"The property of the bankrupt shall pass from trustee to trustee, including under that term the registrar when he fills the office of trustee, and shall vest in the trustee for the time being during his continuance in office, without any conveyance, assignment, or transfer whatever" (s. 83). 1594.

"The certificate of appointment of a trustee shall, for all

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purposes of any law in force in any part of the British dominions requiring registration, enrolment, or recording of conveyances or assignment of property, be deemed to be a conveyance or assignment of property, and may be registered, enrolled, and recorded accordingly" (s. 83).  
**1595.**

Descrip-  
tions of  
bankrupt's  
property  
divisible  
amongst  
creditors.

"The property of the bankrupt divisible amongst his creditors, shall not comprise the following particulars:—1. Property held by the bankrupt on trust for any other person; 2. The tools (if any) of his trade, and the necessary wearing apparel and bedding of himself, his wife and children, to a value, inclusive of tools and apparel and bedding, not exceeding twenty pounds in the whole. But it shall comprise the following particulars: 3. All such property as may belong to or be vested in the bankrupt at the commencement of the bankruptcy, or may be acquired by or devolve on him during his continuance; 4. The capacity to exercise and to take proceedings for exercising all such powers in or over or in respect of property as might have been exercised by the bankrupt for his own benefit at the commencement of his bankruptcy or during its continuance, except the right of nomination to a vacant ecclesiastical benefice; 5. All goods and chattels being, at the commencement of the bankruptcy, in the possession, order, or disposition of the bankrupt, being a trader, by the consent and permission of the true owner, of which goods and chattels the bankrupt is reputed owner, or of which he has taken upon himself the sale or disposition as owner; provided that things in action, other than debts due to him in the course of his trade or business, shall not be deemed goods and chattels within the meaning of this clause" (s. 15).  
**1596.**

Stock,  
shares, or  
other pro-  
perty trans-  
ferable in  
books of a

"Where any portion of the property of the bankrupt consists of stock, shares in ships, shares, or any other property transferable in the books of any company, office,

or person, the right to transfer such property shall be absolutely vested in the trustee to the same extent as the bankrupt might have exercised the same if he had not become bankrupt. Where any portion of such estate consists of copyhold or customary property, or any like property passing by surrender and admittance or in any similar manner, the trustee shall not be compellable to be admitted to such property, but may deal with the same in the same manner as if such property had been capable of being and had been duly surrendered or otherwise conveyed to such uses as the trustee may appoint; and any appointee of the trustee shall be admitted or otherwise invested with the property accordingly. Where any portion of the property of the bankrupt consists of things in action, any action, suit, or other proceeding for the recovery of such things instituted by the trustee shall be instituted in his official name, as in this Act provided; and such things shall, for the purpose of such action, suit, or other proceeding, be deemed to be assignable in law, and to have been duly assigned to the trustee in his official capacity" (s. 22). 1597.

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company,  
office, or  
person.

Copyhold or  
customary  
property.

Things in  
action.

"When any property of the bankrupt acquired by the trustee under this Act consists of land of any tenure burdened with onerous covenants, of unmarketable shares in companies, of unprofitable contracts, or of any other property that is unsaleable, or not readily saleable, by reason of its binding the possessor thereof to the performance of any onerous act, or to the payment of any sum of money, the trustee, notwithstanding he has endeavoured to sell, or has taken possession of such property or exercised any act of ownership in relation thereto, may, by writing under his hand, disclaim such property, and upon the execution of such disclaimer the property disclaimed shall, if the same is a contract, be deemed to be determined from the date of the order of adjudication, and if the same is a lease be deemed to have been surrendered on the same date, and if

Disclaimer  
as to  
onerous  
property.

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the same be shares in any company be deemed to be forfeited from that date, and if any other species of property it shall revert to the person entitled on the determination of the estate or interest of the bankrupt; but if there shall be no person in existence so entitled, then in no case shall any estate or interest therein remain in the bankrupt. Any person interested in any disclaimed property may apply to the Court, and the Court may, upon such application, order possession of the disclaimed property to be delivered up to him, or make such other order as to the possession thereof as may be just" (s. 23). 1598.

Power of  
trustee to  
deal with  
property.

Subject to the provisions of this Act, the trustee shall have power (amongst other things): "To deal with any property to which the bankrupt is beneficially entitled as tenant in tail in the same manner as the bankrupt might have dealt with the same; and the sections fifty-six to seventy-three (both inclusive) of the Act of the session of the third and fourth years of the reign of King William the Fourth (chapter seventy-four), 'for the abolition of fines and recoveries, and for the substitution of more simple modes of assurance,' shall extend and apply to proceedings in bankruptcy under this Act as if those sections were here re-enacted and made applicable in terms to such proceedings:" 1599.

"To exercise any powers the capacity to exercise which is vested in him under this Act, and to execute all powers of attorney, deeds, and other instruments expedient or necessary for the purpose of carrying into effect the provisions of this Act:" 1600.

"To sell all the property of the bankrupt (including the goodwill of the business, if any, and the book debts due or growing due to the bankrupt) by public auction or private contract, with power, if he thinks fit, to transfer the whole thereof to any person or company, or to sell the same in parcels:" 1601.



PART III.  
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“To give receipts for any money received by him, which receipt shall effectually discharge the person paying such moneys from all responsibility in respect of the application thereof” (s. 25). **1602.**

“To mortgage or pledge any part of the property of the bankrupt for the purpose of raising money for the payment of his debts” (s. 27). **1603.**

“The bankruptcy of a debtor shall be deemed to have relation back to and to commence at the time of the act of bankruptcy being completed on which the order is made adjudging him to be bankrupt; or if the bankrupt is proved to have committed more acts of bankruptcy than one, to have relation back to and to commence at the time of the first of the acts of bankruptcy that may be proved to have been committed by the bankrupt within twelve months next preceding the order of adjudication; but the bankruptcy shall not relate to any prior act of bankruptcy, unless it be that at the time of committing such prior act the bankrupt was indebted to some creditor or creditors in a sum or sums sufficient to support a petition in bankruptcy, and unless such debt or debts are still remaining due at the time of the adjudication” (s. 11). **1604.**

Commence-  
ment of  
bankruptcy.  
  
Avoidance  
of voluntary  
conveyance  
or transfers.

“Any settlement of property made by a trader not being a settlement made before and in consideration of marriage, or made in favour of a purchaser or incumbrancer in good faith and for valuable consideration, or a settlement made on or for the wife or children of the settlor of property which has accrued to the settlor after marriage in right of his wife, shall, if the settlor becomes bankrupt within two years after the date of such settlement, be void as against the trustee of the bankrupt appointed under this Act, and shall, if the settlor becomes bankrupt at any subsequent time within ten years after the date of such settlement, unless the parties claiming under such settlement can prove that the settlor was at the time of making the settle-

**PART III.**  
**T. 9, CH. 2.**

ment able to pay all his debts without the aid of the property comprised in such settlement, be void against such trustee. Any covenant or contract made by a trader, in consideration of marriage, for the future settlement upon or for his wife or children of any money or property wherein he had not at the date of his marriage any estate or interest, whether vested or contingent in possession or remainder, and not being money or property of or in right of his wife, shall, upon his becoming bankrupt before such property or money has been actually transferred or paid pursuant to such contract or covenant, be void against his trustee appointed under this Act. 'Settlement' shall for the purpose of this section include any conveyance or transfer of property" (s. 91). 1605.

Avoidance  
of fraudulent  
preferences.

"Every conveyance or transfer of property, or charge thereon made, every payment made, every obligation incurred, and every judicial proceeding taken or suffered by any person unable to pay his debts as they become due from his own moneys, in favour of any creditor or any person in trust for any creditor, with a view of giving such creditor a preference over the other creditors, shall, if the person making, taking, paying, or suffering the same become bankrupt within three months after the date of making, taking, paying, or suffering the same, be deemed fraudulent and void as against the trustee of the bankrupt appointed under this Act; but this section shall not affect the rights of a purchaser, payee, or incumbrancer in good faith and for valuable consideration" (s. 92). 1606.

Protection  
of certain  
transactions  
with bank-  
rupt.

"Nothing in this Act contained shall render invalid:—

1. Any payment made in good faith and for value received to any bankrupt before the date of the order of adjudication by a person not having at the time of such payment notice of any act of bankruptcy committed by the bankrupt, and available against him for adjudication; 2. Any payment or delivery of money or goods belonging to a

bankrupt, made to such bankrupt by a depositary of such money or goods before the date of the order of adjudication, who had not at the time of such payment or delivery notice of any act of bankruptcy committed by the bankrupt, and available against him for adjudication. 3. Any contract or dealing with any bankrupt, made in good faith and for valuable consideration, before the date of the order of adjudication, by a person not having at the time of making such contract or dealing, notice of any act of bankruptcy committed by the bankrupt, and available against him for adjudication " (s. 94). **1807.**

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" Subject and without prejudice to the provisions of this Act relating to the proceeds of the sale and seizure of goods of a trader, and to the provisions of this Act avoiding certain settlements, and avoiding, on the ground of their constituting fraudulent preferences, certain conveyances, charges, payments, and judicial proceedings, the following transactions by and in relation to the property of a bankrupt, shall be valid, notwithstanding any prior act of bankruptcy :—1. Any disposition or contract with respect to the disposition of property by conveyance, transfer, charge, delivery of goods, payment of money, or otherwise howsoever made by any bankrupt in good faith and for valuable consideration, before the date of the order of adjudication, with any person not having at the time of the making of such disposition of property notice of any act of bankruptcy committed by the bankrupt, and available against him for adjudication ; 2. Any execution or attachment against the land of the bankrupt, executed in good faith by seizure before the date of the order of adjudication, if the person on whose account such execution or attachment was issued had not at the time of the same being so executed by seizure notice of any act of bankruptcy committed by the bankrupt, and available against him for adjudication ; 3. Any execution or attachment against the

Protection  
of certain  
transactions  
entered into  
by or in  
relation to  
the property  
of the bank-  
rupt.

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goods of any bankrupt, executed in good faith by seizure and sale before the date of the order of adjudication, if the person on whose account such execution or attachment was issued had not at the time of the same being executed by seizure and sale notice of any act of bankruptcy committed by the bankrupt, and available against him for adjudication " (s. 95). 1608.

Liquidation  
by arrange-  
ment.

"A debtor unable to pay his debts may summon a general meeting of his creditors, and such meeting may, by a special resolution as defined by this Act, declare that the affairs of the debtor are to be liquidated by arrangement and not in bankruptcy, and may at that or some subsequent meeting, held at an interval of not more than a week, appoint a trustee, with or without a committee of inspection " (s. 125 (1) ). 1609.

"All such property of the debtor as would, if he were made bankrupt, be divisible amongst his creditors shall, from and after the date of the appointment of a trustee, vest in such trustee under a liquidation by arrangement, and be divisible amongst the creditors, and all such settlements, conveyances, transfers, charges, payments, obligations, and proceedings as would be void against the trustee in the case of a bankruptcy shall be void against the trustee in the case of liquidation by arrangement." "The trustee under a liquidation shall have the same powers, and perform the same duties, as a trustee under a bankruptcy, and the property of the debtor shall be distributed in the same manner as in a bankruptcy " (s. 125). 1610.

## CHAPTER III.

## OF BANKRUPTCY UNDER THE STATUTE OF 1883.

[THE stat. 46 & 47 Vict. c. 52 (Appendix), the Bankruptcy Act, 1883, amends and consolidates the law, and also changes and remodels the practice of bankruptcy. It became law on the 25th of August, 1883, and certain provisions take effect from its passing; thus after that time, in consequence of s. 170, no composition or liquidation by arrangement under ss. 125 and 126 of the Bankruptcy Act, 1869, can take place without the sanction of the Court or Registrar. But the date of its commencement is the 1st of January, 1884, and by s. 170, the Bankruptcy Act, 1869, is repealed from that date, except as to proceedings then pending. Also by s. 127, the Lord Chancellor, with the concurrence of the President of the Board of Trade, is empowered from time to time to make general rules for carrying into effect the objects of the Act. In this chapter will be found a concise account of the principal changes effected by the Act in the law of Bankruptcy, with some important enactments which appear especially applicable to the subject matter of the present work. 1610a.]

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All proceedings under the bankruptcy law must be commenced by a bankruptcy petition, presented on the conditions and in the manner prescribed in the Act (ss. 5, 6, 7, and 8), and followed by an order of the Court, called a receiving order, which results, either in composition or arrangement, or in bankruptcy. But, except under a petition and with the approval of the Court, there can be no liquidation or composition. The acts of bankruptcy

Initiation  
of pro-  
ceedings.

PART III.  
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[are specified in s. 4, and the distinction between traders and non-traders in relation to acts of bankruptcy, and generally throughout the Act, is abolished. After the presentation of a petition an official receiver may be appointed at any time, to be receiver of the debtor's property. 1610b.

Receiving  
order.

The first result of a bankruptcy petition, properly substantiated, is the making of a receiving order by the Court, the effect of which is to constitute the person appointed to act as official receiver, receiver of the debtor's property, and to stay proceedings by unsecured creditors. But the order does not, like an adjudication order, make the debtor a bankrupt or divest him of his property, or subject him to the forfeitures and disabilities contingent on bankruptcy (ss. 5, 7, 8, and 9). Every debtor against whom a receiving order is made is publicly examined in Court as to his conduct and property; in which examination the official receiver must, and the creditors, and trustee (if appointed), may take part, and the debtor is bound to answer all proper questions (s. 17). But a receiving order cannot be made against any corporation, or against any partnership, or association, or company registered under the Companies Act, 1862 (s. 123). 1610c.

First meet-  
ing of  
creditors.

The first meeting of creditors, after the making of a receiving order, is held for the purpose of considering whether a composition or scheme of arrangement shall be entertained, or whether the debtor shall be adjudged bankrupt; and in the latter case the creditors may at once appoint a trustee (ss. 15, 21). The meeting must be summoned by the official receiver, and must be held within fourteen days of the receiving order,—unless a later date is, for any special reason, allowed,—and at least seven days' notice must be given by advertisement. The official receiver must also send notice to each creditor,

[together with a summary of the debtor's statement and the receiver's observations thereon (schedule 1, rules 1-3). PART III.  
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**1610a.**

At the first meeting the creditors may resolve by special resolution, to entertain a proposal for a composition or scheme of arrangement. For the acceptance of a composition or arrangement, there must be a subsequent confirming resolution by a majority in number, representing three-fourths in value, of all the creditors, which must not be passed until the debtor's public examination is concluded, nor until there has been circulated among the creditors a notice stating the terms of the proposal, and a report of the official receiver thereon (s. 18, (1—3)). When a composition or scheme of arrangement has been accepted, the Court may approve it after hearing a report of the official receiver, but must withhold its approval if the proposal does not appear to be reasonable, or calculated to benefit the general body of creditors, or if the debtor has committed any misdemeanour under the Bankruptcy Law, or under Part II. of the Debtors' Act, 1869. It is also within the discretion of the Court to withhold its approval if the debtor has been guilty of any such misconduct as would justify the Court in withholding, suspending, or qualifying his discharge (s. 18, (5, 6)). Any trustee appointed under a composition or scheme, is subject to all the regulations applicable to a trustee in bankruptcy, and the provisions of Part III. of the Act, with reference to the administration of property, apply to a composition or scheme as far as possible (s. 18, (12, 13)). **1610e.**

Composition  
or scheme  
of arrange-  
ment.

If a composition or scheme is not accepted and approved, or if the creditors pass a resolution that the debtor be adjudged bankrupt, or pass no resolution, the Court will adjudge the debtor bankrupt, and the property of the bankrupt then becomes divisible amongst his creditors

Adjudica-  
tion of  
bankruptcy  
and vesting  
of property.





[such property as may belong to or be vested in the bankrupt at the commencement of the bankruptcy, or may be acquired by or devolve on him before his discharge ; and, (ii.) The capacity to exercise and to take proceedings for exercising all such powers in or over or in respect of property as might have been exercised by the bankrupt for his own benefit at the commencement of his bankruptcy or before his discharge, except the right of nomination to a vacant ecclesiastical benefice ; and, (iii.) All goods being, at the commencement of the bankruptcy, in the possession, order, or disposition of the bankrupt, in his trade or business, by the consent and permission of the true owner, under such circumstances that he is the reputed owner thereof ; provided that things in action other than debts due or growing due to the bankrupt in the course of his trade or business, shall not be deemed goods within the meaning of this section" (s. 44). 1610h.

Also "(1) Where any part of the property of the bankrupt consists of lands of any tenure burdened with onerous covenants, of shares or stock in companies, of unprofitable contracts, or of any other property that is unsaleable, or not readily saleable, by reason of its binding the possessor thereof to the performance of any onerous act, or to the payment of any sum of money, the trustee, notwithstanding that he has endeavoured to sell or has taken possession of the property, or exercised any act of ownership in relation thereto, but subject to the provisions of this section, may, by writing signed by him, at any time within three months after the first appointment of a trustee, disclaim the property. Provided that where any such property shall not have come to the knowledge of the trustee within one month after such appointment, he may disclaim such property at any time within two months after he first became aware thereof. (2) The disclaimer shall operate to determine, as from the date of disclaimer, the rights, interests,

Disclaimer  
of onerous  
property.

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[and liabilities of the bankrupt and his property in or in respect of the property disclaimed, and shall also discharge the trustee from all personal liability in respect of the property disclaimed, as from the date when the property vested in him, but shall not, except so far as is necessary for the purpose of releasing the bankrupt and his property and the trustee from liability, affect the rights or liabilities of any other person. (3) A trustee shall not be entitled to disclaim a lease without the leave of the Court, except in any cases which may be prescribed by general rules, and the Court may, before or on granting such leave, require such notices to be given to persons interested, and impose such terms as a condition of granting leave, and make such orders with respect to fixtures, tenant's improvements, and other matters arising out of the tenancy as the Court thinks just. (4) The trustee shall not be entitled to disclaim any property in pursuance of this section in any case where an application in writing has been made to the trustee by any person interested in the property requiring him to decide whether he will disclaim or not, and the trustee has for a period of twenty-eight days after the receipt of the application, or such extended period as may be allowed by the Court, declined or neglected to give notice whether he disclaims the property or not; and, in the case of a contract, if the trustee, after such application as aforesaid, does not within the said period or extended period disclaim the contract, he shall be deemed to have adopted it. (5) The Court may, on the application of any person who is, as against the trustee, entitled to the benefit or subject to the burden of a contract made with the bankrupt, make an order rescinding the contract on such terms as to payment by or to either party of damages for the non-performance of the contract, or otherwise, as to the Court may seem equitable, and any damages payable under the order to any such person may be proved by him

[as a debt under the bankruptcy. (6) The Court may, on application by any person either claiming any interest in any disclaimed property, or under any liability not discharged by this Act in respect of any disclaimed property, and on hearing such persons as it thinks fit, make an order for the vesting of the property in or delivery thereof to any person entitled thereto, or to whom it may seem just that the same should be delivered by way of compensation for such liability as aforesaid, or a trustee for him, and on such terms as the Court thinks just; and on any such vesting order being made, the property comprised therein shall vest accordingly in the person therein named in that behalf without any conveyance or assignment for the purpose. Provided always, that where the property disclaimed is of a leasehold nature, the Court shall not make a vesting order in favour of any person claiming under the bankrupt, whether as under-lessee or (as mortgagee by demise except upon the terms of making such person subject to the same liabilities and obligations as the bankrupt was subject to under the lease in respect of the property at the date when the bankruptcy petition was filed, and any mortgagee or under-lessee declining to accept a vesting order upon such terms shall be excluded from all interest in and security upon the property, and if there shall be no person claiming under the bankrupt who is willing to accept an order upon such terms, the Court shall have power to vest the bankrupt's estate and interest in the property in any person liable either personally or in a representative character, and either alone or jointly with the bankrupt to perform the lessee's covenants in such lease, freed and discharged from all estates, incumbrances, and interests created therein by the bankrupt. (7) Any person injured by the operation of a disclaimer under this section shall be deemed to be a creditor of the bankrupt to the extent of the injury, and may accordingly prove

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[the same as a debt under the bankruptcy" (s. 55).  
**1610i.**

Restriction  
of rights of  
creditor  
under  
execution or  
attachment.

In connection with the debtor's property the statute contains the following provisions with respect to the effect of bankruptcy on antecedent transactions of the debtor :—  
“(1) Where a creditor has issued execution against the goods or lands of a debtor, or has attached any debt due to him, he shall not be entitled to retain the benefit of the execution or attachment against the trustee in bankruptcy of the debtor, unless he has completed the execution or attachment before the date of the receiving order, and before notice of the presentation of any bankruptcy petition by or against the debtor, or of the commission of any available act of bankruptcy by the debtor. (2) For the purposes of this Act, an execution against goods is completed by seizure and sale; an attachment of a debt is completed by the receipt of the debt; and an execution against land is completed by seizure, or, in the case of an equitable interest, by the appointment of a receiver” (s. 45). **1610k.**

Duties of  
sheriff as  
to goods  
taken in  
execution.

Also “(1) Where the goods of a debtor are taken in execution, and before the sale thereof notice is served on the sheriff that a receiving order has been made against the debtor, the sheriff shall, on request, deliver the goods to the official receiver or trustee under the order, but the costs of the execution shall be a charge on the goods so delivered, and the official receiver or trustee may sell the goods or an adequate part thereof for the purpose of satisfying the charge. (2) Where the goods of a debtor are sold under an execution in respect of a judgment for a sum exceeding twenty pounds, the sheriff shall deduct the costs of the execution from the proceeds of sale, and retain the balance for fourteen days, and if within that time notice is served on him of a bankruptcy petition having been presented against or by the debtor, and the debtor is

[adjudged bankrupt thereon or on any other petition of which the sheriff has notice, the sheriff shall pay the balance to the trustee in the bankruptcy, who shall be entitled to retain the same as against the execution creditor, but otherwise he shall deal with it as if no notice of the presentation of a bankruptcy petition had been served on him. (3) An execution levied by seizure and sale on the goods of a debtor is not invalid by reason only of its being an act of bankruptcy, and a person who purchases the goods in good faith under a sale by the sheriff shall in all cases acquire a good title to them against the trustee in bankruptcy" (s. 46). 1610i.

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The avoidance of voluntary settlements and fraudulent preferences, and the protection of bonâ fide transactions, are regulated by the following enactments:—“(1) Any settlement of property not being a settlement made before and in consideration of marriage, or made in favour of a purchaser or incumbrancer in good faith and for valuable consideration, or a settlement made on or for the wife or children of the settlor of property which has accrued to the settlor after marriage in right of his wife, shall, if the settlor becomes bankrupt within two years after the date of the settlement, be void against the trustee in bankruptcy, and shall, if the settlor becomes bankrupt at any subsequent time within ten years after the date of the settlement, be void against the trustee in the bankruptcy, unless the parties claiming under the settlement can prove that the settlor was at the time of making the settlement able to pay all his debts without the aid of the property comprised in the settlement, and that the interest of the settlor in such property had passed to the trustee of such settlement on the execution thereof. (2) Any covenant or contract made in consideration of marriage, for the future settlement on or for the settlor's wife or children of any money or property wherein he had

Avoidance  
of voluntary  
settlements.

PART III.  
T. 9, CH. 3.

[not at the date of his marriage any estate or interest, whether vested or contingent in possession or remainder, and not being money or property of or in right of his wife, shall, on his becoming bankrupt before the property or money has been actually transferred or paid pursuant to the contract or covenant, be void against the trustee in the bankruptcy. (3) 'Settlement' shall for the purposes of this section include any conveyance or transfer of property" (s. 47). 1610m.

Avoidance  
of prefer-  
ences in  
certain  
cases.

Also "(1) Every conveyance or transfer of property, or charge thereon made, every payment made, every obligation incurred, and every judicial proceeding taken or suffered by any person unable to pay his debts as they become due from his own money in favour of any creditor, or any person in trust for any creditor, with a view of giving such creditor a preference over the other creditors shall, if the person making, taking, paying, or suffering the same is adjudged bankrupt on a bankruptcy petition presented within three months after the date of making, taking, paying, or suffering the same, be deemed fraudulent and void as against the trustee in the bankruptcy. (2) This section shall not affect the rights of any person making title in good faith and for valuable consideration through or under a creditor of the bankrupt" (s. 48). 1610m.

Protection  
of bonâ fide  
transactions  
without  
notice.

And "subject to the foregoing provisions of this Act with respect to the effect of bankruptcy on an execution or attachment, and with respect to the avoidance of certain settlements and preferences, nothing in this Act shall invalidate, in the case of a bankruptcy—

- (a.) Any payment by the bankrupt to any of his creditors ;
- (b.) Any payment or delivery to the bankrupt ;
- (c.) Any conveyance or assignment by the bankrupt for valuable consideration ;

[(d.) Any contract, dealing, or transaction by or with the bankrupt for valuable consideration ;

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T. 9, CH. 3.

Provided that both the following conditions are complied with, namely,—

- (1) The payment, delivery, conveyance, assignment, contract, dealing, or transaction, as the case may be, takes place before the date of the receiving order ; and
- (2) The person (other than the debtor) to, by, or with whom the payment, delivery, conveyance, assignment, contract, dealing, or transaction was made, executed, or entered into, has not at the time of the payment, delivery, conveyance, assignment, contract, dealing, or transaction, notice of any available act of bankruptcy committed by the bankrupt before that time " (s. 49). 1610o.

Where a debtor is adjudged bankrupt, or the creditors have resolved in favour of adjudication, they may appoint a trustee (s. 21, (1)), who must give security to the satisfaction of the Board of Trade ; and the Board may, subject to an appeal to the High Court, object to his appointment on the ground that it has not been made in good faith by a majority in value of the creditors, or that he is unfit to act, or that he is not likely to act in the interests of the creditors generally. The certificate of appointment is given by the Board of Trade (s. 21, (2, 3)). If the creditors fail to appoint a trustee within four weeks from the date of the adjudication, or within a longer period, if negotiations for composition or arrangement are pending, the Board of Trade may appoint some fit person to be the trustee, subject to the right of the creditors to appoint a trustee at any subsequent time (s. 21, (6, 7)). During any vacancy the official receiver acts as trustee (s. 70, (1g)) ; and on the appointment of a trustee the duties of the official receiver, connected with the management of the

Appoint-  
ment of  
trustee.

PART III.  
T. 9, CH. 3.

[property, cease, or are suspended, but he continues to watch the case, and to act, if necessary, in the interests of justice (see ss. 68-70, 82 (4), etc.). 1610p.

Possession  
of property  
by trustee.

The realization by the trustee of the bankrupt's property, and the powers of the trustee alone to deal with the property, are regulated as follows:—“(1) The trustee shall, as soon as may be, take possession of the deeds, books, and documents of the bankrupt, and all other parts of his property capable of manual delivery. (2) The trustee shall, in relation to and for the purpose of acquiring or retaining possession of the property of the bankrupt, be in the same position as if he were a receiver of the property appointed by the High Court, and the Court may, on his application, enforce such acquisition or retention accordingly. (3) Where any part of the property of the bankrupt consists of stock, shares in ships, shares or any other property transferable in the books of any company, office, or person, the trustee may exercise the right to transfer the property to the same extent as the bankrupt might have exercised it if he had not become bankrupt. (4) Where any part of the property of the bankrupt is of copyhold or customary tenure, or is any like property passing by surrender and admittance or in any similar manner, the trustee shall not be compellable to be admitted to the property, but may deal with it in the same manner as if it had been capable of being and had been duly surrendered or otherwise conveyed to such uses as the trustee may appoint; and any appointee of the trustee shall be admitted to or otherwise invested with the property accordingly. (5) Where any part of the property of the bankrupt consists of things in action, such things shall be deemed to have been duly assigned to the trustee. (6) Any treasurer or other officer, or any banker, attorney, or agent of a bankrupt, shall pay and deliver to the trustee all money and securities in his pos-



[session or power, as such officer, banker, attorney, or agent, which he is not by law entitled to retain as against the bankrupt or the trustee. If he does not, he shall be guilty of a contempt of Court, and may be punished accordingly on the application of the trustee" (s. 50). 1610q.

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T. 9, CH. 3.

"Subject to the provisions of this Act, the trustee may do all or any of the following things : (1) Sell all or any part of the property of the bankrupt (including the goodwill of the business, if any, and the book debts due or growing due to the bankrupt), by public auction or private contract, with power to transfer the whole thereof to any person or company, or to sell the same in parcels ; (2) Give receipts for any money received by him, which receipts shall effectually discharge the person paying the money from all responsibility in respect of the application thereof ; (3) Prove, rank, claim, and draw a dividend in respect of any debt due to the bankrupt ; (4) Exercise any powers, the capacity to exercise which is vested in the trustee under this Act, and execute any powers of attorney, deeds, and other instruments for the purpose of carrying into effect the provisions of this Act ; (5) Deal with any property to which the bankrupt is beneficially entitled as tenant in tail in the same manner as the bankrupt might have dealt with it ; and sections fifty-six to seventy-three (both inclusive) of the Act of the session of the third and fourth years of the reign of King William the Fourth (chapter seventy-four), 'for the abolition of fines and recoveries, and for the substitution of more simple modes of assurance,' shall extend and apply to proceedings under this Act, as if those sections were here re-enacted and made applicable in terms to those proceedings" (s. 56). 1610r.

Powers of trustee to deal with property.

A committee of inspection may be nominated by the creditors qualified to vote, at their first or any subsequent meeting, and must consist of creditors qualified to vote, or the holders of general proxies or general powers of attorney

Committee of inspection.

PART III.  
T. 9, CH. 3.

[from such creditors ; but there must not be more than five nor less than three members (s. 22, (1)). If a committee is not appointed, the Board of Trade will direct the trustee in the matters in which he is required to have the permission of the committee of inspection (s. 22, (9)). These matters are enumerated in the following enactment :— 1610s.

Powers  
exercisable  
by trustee  
with per-  
mission of  
committee  
of inspec-  
tion.

“The trustee may, with the permission of the committee of inspection, do all or any of the following things ; (1) Carry on the business of the bankrupt, so far as may be necessary for the beneficial winding up of the same ; (2) Bring, institute, or defend any action or other legal proceeding relating to the property of the bankrupt ; (3) Employ a solicitor or other agent to take any proceedings or do any business which may be sanctioned by the committee of inspection ; (4) Accept as the consideration for the sale of any property of the bankrupt, a sum of money payable at a future time subject to such stipulations as to security and otherwise as the committee think fit ; (5) Mortgage or pledge any part of the property of the bankrupt for the purpose of raising money for the payment of his debts ; (6) Refer any dispute to arbitration, compromise all debts, claims, and liabilities, whether present or future, certain or contingent, liquidated or unliquidated, subsisting or supposed to subsist between the bankrupt and any person who may have incurred any liability to the bankrupt, on the receipt of such sums, payable at such times, and generally on such terms as may be agreed on ; (7) Make such compromise or other arrangement as may be thought expedient with creditors, or persons claiming to be creditors, in respect of any debts provable under the bankruptcy ; (8) Make such compromise or other arrangement as may be thought expedient with respect to any claim arising out of or incidental to the property of the bankrupt, made or capable of being made on the trustee by any person or by the trustee on any person ;

PART III.  
T. 9, CH. 3.

[(9) Divide in its existing form amongst the creditors, according to its estimated value, any property which from its peculiar nature or other special circumstances cannot be readily or advantageously sold. The permission given for the purposes of this section shall not be a general permission to do all or any of the above-mentioned things, but shall only be a permission to do the particular thing or things for which permission is sought in the specified case or cases " (s. 57). **1610r.**

Composition  
or scheme  
after  
adjudica-  
tion.

The creditors may at any time after adjudication, resolve by special resolution, to entertain a composition or scheme, whereupon the same proceedings ensue as in the case of composition or scheme before adjudication ; and if default is made in carrying out the composition the bankruptcy may be revived (s. 23). **1610u.**

Discharge of  
bankrupt.

At any time after being adjudged bankrupt, the bankrupt may apply to the Court for an order of discharge, but the application will not be heard until the public examination of the bankrupt is concluded. Notice of the day fixed for the hearing is published, and sent to the creditors, and on the hearing of the application, the Court takes into consideration the report of the official receiver as to the bankrupt's conduct and affairs, and may either grant the order unconditionally, or, on proof of certain acts of misconduct by the bankrupt, refuse or suspend it, or qualify it by conditions as to after-acquired property ; but the Court will refuse discharge if the debtor has committed any misconduct under the Bankruptcy Law, or under Part II. of the Debtors Act, 1869 (s. 28). The provisions of the 54th section of the Bankruptcy Act, 1869, under which an undischarged bankrupt is protected for three years from the close of his bankruptcy are not re-enacted, and provision is made for enabling the Court to make an order under which a bankrupt's after-acquired property may be recovered and applied for the benefit of his creditors (s. 28, (6)). **1610v.**

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T. 9, CH. 3.

[and liabilities of the bankrupt and his property in or in respect of the property disclaimed, and shall also discharge the trustee from all personal liability in respect of the property disclaimed, as from the date when the property vested in him, but shall not, except so far as is necessary for the purpose of releasing the bankrupt and his property and the trustee from liability, affect the rights or liabilities of any other person. (3) A trustee shall not be entitled to disclaim a lease without the leave of the Court, except in any cases which may be prescribed by general rules, and the Court may, before or on granting such leave, require such notices to be given to persons interested, and impose such terms as a condition of granting leave, and make such orders with respect to fixtures, tenant's improvements, and other matters arising out of the tenancy as the Court thinks just. (4) The trustee shall not be entitled to disclaim any property in pursuance of this section in any case where an application in writing has been made to the trustee by any person interested in the property requiring him to decide whether he will disclaim or not, and the trustee has for a period of twenty-eight days after the receipt of the application, or such extended period as may be allowed by the Court, declined or neglected to give notice whether he disclaims the property or not ; and, in the case of a contract, if the trustee, after such application as aforesaid, does not within the said period or extended period disclaim the contract, he shall be deemed to have adopted it. (5) The Court may, on the application of any person who is, as against the trustee, entitled to the benefit or subject to the burden of a contract made with the bankrupt, make an order rescinding the contract on such terms as to payment by or to either party of damages for the non-performance of the contract, or otherwise, as to the Court may seem equitable, and any damages payable under the order to any such person may be proved by him

[as a debt under the bankruptcy. (6) The Court may, on application by any person either claiming any interest in any disclaimed property, or under any liability not discharged by this Act in respect of any disclaimed property, and on hearing such persons as it thinks fit, make an order for the vesting of the property in or delivery thereof to any person entitled thereto, or to whom it may seem just that the same should be delivered by way of compensation for such liability as aforesaid, or a trustee for him, and on such terms as the Court thinks just; and on any such vesting order being made, the property comprised therein shall vest accordingly in the person therein named in that behalf without any conveyance or assignment for the purpose. Provided always, that where the property disclaimed is of a leasehold nature, the Court shall not make a vesting order in favour of any person claiming under the bankrupt, whether as under-lessee or as mortgagee by demise except upon the terms of making such person subject to the same liabilities and obligations as the bankrupt was subject to under the lease in respect of the property at the date when the bankruptcy petition was filed, and any mortgagee or under-lessee declining to accept a vesting order upon such terms shall be excluded from all interest in and security upon the property, and if there shall be no person claiming under the bankrupt who is willing to accept an order upon such terms, the Court shall have power to vest the bankrupt's estate and interest in the property in any person liable either personally or in a representative character, and either alone or jointly with the bankrupt to perform the lessee's covenants in such lease, freed and discharged from all estates, incumbrances, and interests created therein by the bankrupt. (7) Any person injured by the operation of a disclaimer under this section shall be deemed to be a creditor of the bankrupt to the extent of the injury, and may accordingly prove

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grant was necessary on the part of the tenant of the particular estate, in tail, for life, or for years. But attornment is rendered unnecessary by the statute 4 & 5 Anne c. 16, ss. 9, 10 (*a*). 1612.

A person  
cannot  
derogate  
from his  
own grant.

A person cannot derogate from his own grant; and hence he cannot, by parting with his estate, prejudice those in whose favour he has created estates, interests, or charges out of that estate (*b*). The rule, *Cessante statu primitivo cessat et derivativus*, applies only when the original estate determines by limitation or is defeated by a condition or by forfeiture. It does not apply when the owner of the estate does any act which amounts to an alienation or transfer, even though such an alienation or transfer produces an extinguishment of the original estate (*c*). Therefore, if one who has a lease for life or years of the manor to which an advowson is appendant, grants the next avoidance that shall happen during the lease, or grants a rent out of the manor, and then surrenders the manor so that his estate is gone, the grant of the next avoidance or of the rent continues good, and the grantee shall enjoy it according to the grant so long as the estate that is surrendered would have had continuance if not surrendered (*d*). So, if a lessee for years of an advowson grants the next avoidance if it shall happen to become void during the term, and afterwards surrenders the estate to the person who has the inheritance, the grantee shall have the next avoidance, if it happen before the term would have expired in regular course (*e*). So, if a tenant for life or lessee for years grants

(*a*) 1 Steph. Com. 448, 450; 3 Jarm. & Byth. by Sweet. 36; 2 Pres. Shep. T. 297; Burton, § 41; Watk. Conv. 3rd ed. by Prest. 171; Co. Litt. 309a. In Co. Litt. a large space is given to the subject of attornment. see 309 a—325 a.

(*b*) See 2 Pres. Shep. T. 285—6; Co. Litt. 233 b, 238 b; Watk.

Conv. 3rd ed. by Prest. 24; *Norby v. Harrison*, 1 Johns. & Hem. 393; *Siddons v. Short*, L. R. 2 C. P. D. 572.

(*c*) 2 Pres. Shep. T. 285; Watk. Conv. 3rd ed. by Prest. 24, 25.

(*d*) 2 Pres. Shep. T. 285.

(*e*) 2 Pres. Shep. T. 286.

a rent charge to a stranger, and afterwards surrenders his estate, still the rent continues as long as the estate would have lasted if not surrendered (*a*). So, if a lessee makes an underlease, and afterwards surrenders the original lease, the underlease shall continue in force (*b*) ; but by the old law, prior to the stat. 7 & 8 Vict. c. 76, s. 12, and 8 & 9 Vict. c. 106, s. 9, the reversion was merged, and the remedies incident to it were extinguished (*c*), unless the surrender were for the purpose of renewal (*d*). [Where, however, the owner of an estate granted a lease of a plot of his land to one lessee, who covenanted not to erect any building without the lessor's approval, and then the lessor granted a lease of an adjoining plot to another lessee ; it was held, on appeal, that the lessor could not be restrained from giving his approval to the erection by the first lessee, of a building, so as to darken the windows of the second lessee (*e*).] **1613.**

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T. 10, CH. 1.

A femme covert may be restrained from alienation without any clause of cesser, but a person not under coverture cannot (*f*). **1614.**

Restraint on  
alienation.

It may be stated in this place, that, subject to exceptions where tenants in tail are restrained by statute from defeating their estates tail, or where the reversion is in the Crown, [settled estates, that is estates limited by any instrument to or in trust for any persons in succession, or timber growing upon settled estates, may be alienated ; and that parts of settled estates may be laid out for streets, roads, paths, squares, gardens, or other open spaces, sewers, drains, etc., either to be dedicated to the public or not.

Alienation  
of settled  
estates.

(*a*) 2 Pres. Shep. T. 286 ; Co. Litt. 185 a, 338 b.

(*b*) *Mellor v. Watkins*, L. R. 9 Q. B. 400, 405.

(*c*) 2 Pres. Shep. T. 285 ; Watk. Conv. 3rd ed. by Prest. 24 ; see Part III. Tit. 12, Ch. 2, s. 5, *infra*, on Leases.

(*d*) Platt on Leas. 787-8.

(*e*) *Master v. Hansard*, L. R. 4 Ch. D. (Ap.) 718.

(*f*) 11 Jarm. & Byth. by Sweet, 473 ; *Renaud v. Tourangeau*, L. R. 2 P. C. 4 ; see *supra*, par. 237—242.

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T. 10, CH. 1.

This may be accomplished either with the authorization of the Chancery Division of the High Court of Justice upon due application, under stat. 37 & 38 Vict. c. 57 (a), or without application to the Court, and by virtue of the provisions of stat. 45 & 46 Vict. c. 38 (b). But if the alienation is carried out under the latter statute, then, in cases coming within the 63rd section of that Act, of the exercise by trustees of a discretionary trust or power of sale, the consent prescribed by the 56th section, of the person or persons constituting the tenant for life within the meaning of that Act, is necessary to the validity of the sale. When, however, settled land is sold by trustees acting under an absolute trust for sale, it has been decided that such consent is unnecessary, and that the conveyance of the legal estate by the trustees without the concurrence of the tenant for life, is sufficient to give a good title to the purchaser (c).] 1615.

(a) See Appendix.

(c) *Taylor v. Poncia*, 32 V. R. 335.

(b) See Appendix.



## CHAPTER II.

OF A VENDOR'S TITLE (*a*).

## SECTION I.

*Of the Requisite Length of Title (b).*

BEFORE the stat. 3 & 4 Will. 4, c. 27, a purchaser had a right to require a title commencing at least sixty years previously to the time of his purchase; because the old Statute of Limitations could not in a shorter period confer a title (*c*). And the Statute of Limitations of Will. 4 did not in effect introduce any new rule on the subject; for, although it conferred a title in forty years in ordinary cases instead of sixty years, yet in many instances a forty years' title was quite insufficient; for adverse possession against a tenant for life during his whole life would not affect a remainderman or reversioner (*d*). Indeed, a title for a shorter period than sixty years was not marketable (*e*). And in the case of an advowson, a hundred years' title at the least is necessary (*f*). And in other cases, even sixty years was sometimes insufficient. For instance, if it might reasonably be presumed from the contents of the abstract that estates tail were subsisting,

Pr. III. T. 10,  
Ch. 2, s. 1.

Sixty years' title formerly required.

Sixty years' title not always sufficient.

(*a*) On this subject the reader is referred generally to Lord St. Leonards' "Law of Vendors and Purchasers" (an invaluable mass of law and practice). The present chapter chiefly consists of short extracts of a few leading points from that work.

(*b*) See *supra*, Ch. II., p. 619.

(*c*) Sugd. Concise View, 265.

(*d*) See Sugd. Concise View, 265; 1 Jarm. & Byth. by Sweet, 59—61; 9 Id. 28.

(*e*) 1 Jarm. & Byth. by Sweet, 60. n. (*i*).

(*f*) Sugd. Concise View, 267, *infra*, par. 1618a.

**Pr. III. T. 10,** the purchaser might demand the production of the prior  
**Ch. 2, s. 1.** title (*a*). **1616.**

**Stat. 37 & 38**  
**Vict. c. 78,**  
**s. 1.**

By the stat. 37 & 38 Vict. c. 78, s. 1 (Appendix), it is enacted, that "In the completion of any contract of sale of land made after December 31st, 1874, and subject to any stipulation to the contrary in the contract, forty years shall be substituted as the period of commencement of title which a purchaser may require in place of sixty years, the present period of such commencement; nevertheless earlier title than forty years may be required in cases similar to those in which earlier title than sixty years may now be required." **1617.**

Right to  
 production  
 of prior  
 title.

[Under the old law where the statement in the abstract, or its silence, led to a fair inference that the prior title might disclose an existing defect, the purchaser might require it to be produced; although, where it was not in the seller's power, he could not object to the title upon mere suspicion (*b*). If nothing appeared on the face of the deeds comprised within the period through which a purchaser was entitled to investigate the title, which threw a reasonable doubt or suspicion on the anterior title, the want of the prior instruments, though referred to or recited in the abstracted deeds, was not material (*c*). But where an assurance depended for its validity upon something which had been previously done, the whole transaction should have been stated upon the abstract, although the abstract might thereby be carried beyond sixty years. Thus, an appointment should not have been abstracted without previously showing the creation of the power, and the ceremonies requisite to the valid exercise of it; nor a post-nuptial settlement executed in pursuance of articles antecedent to the marriage, without first abstracting the articles at length,

(*a*) Sugd. Concise View, 265; 1  
 Jarm. & Byth. by Sweet, 60, n. (*i*).

(*b*) Sugd. Concise View, 266.

(*c*) 1 Jarm. & Byth. by Sweet,  
 62.

[that it might be seen whether or not the settlement was in conformity with them (a). But this is materially altered by the provisions (set forth in par. 1663a) of s. 3 of stat. 44 & 45 Vict. c. 41 (Appendix). **1618.**

Pr. III. T. 10,  
Ch. 2, s. 1.

In accordance with the latter part of s. 1 of stat. 37 & 38 Vict. c. 78 (Appendix), the title to an advowson ought to be carried back for one hundred years, except in cases clearly within s. 30 of stat. 3 & 4 Will. 4, c. 27. Also in the case of a term of years the proper commencement of title will still be the deed by which it is created, but the subsequent title need not be carried back for more than forty years (b).] **1618a.**

Advowson.

Term of  
years.

## SECTION II.

### *Of the Kind of Title which is requisite.*

In contracts for the sale of real estate, an agreement to make a title is always implied, unless the liability is expressly excluded. And an agreement generally to sell, not expressing the interest in the subject, includes all the vendor's interest (c). **1619.**

Pr. III. T. 10,  
Ch. 2, s. 2.

Implied  
agreement  
to make a  
title to all  
the vendor's  
interest.

Where a contract is entered into for the purchase of "a freehold," the purchaser is entitled to have a clear freehold title, and not a title incumbered with any covenant or condition (d). **1620.**

Freehold.

A purchaser cannot be compelled to take a title, if it is doubtful, in the opinion of the Court, although the Court itself may have a favourable opinion of the title; for the Court has no means of settling the question as against adverse claimants, or of indemnifying the purchaser, if its own opinion should turn out not to be well founded (e).

Doubtful  
title.

(a) 1 Jarm. & Byth. by Sweet,  
67.

(b) *Frend v. Buckley*, L. R. 5  
Q. B. (Ex. Ch.) 213.

(c) Sugd. Concise View, 13.

(d) *Phillips v. Caldeleugh*, L. R.  
4 Q. B. 159.

(e) *Rogers v. Waterhouse*, 4  
Drewry 329; *Pyrke v. Wadding-  
ham*, 10 Hare 7, 10; *Sykes v.  
Sheard*, 2 D. J. & S. 6; *Collier v.  
McBean*, L. R. 1 Ch. Ap. 81; *Mul-  
lings v. Trinder*, L. R. 10 Eq. 449.

Pr. III. T. 10, Ch. 2, s. 2. But still he will not be permitted to object to a title on account of a bare possibility or suspicion (*a*). And if the Court is clearly of opinion that the title is good, it may not be deterred from enforcing specific performance, by the fact that one of the conveyancing counsel of the Court, or a judge of the Court below, considered the title doubtful (*b*). A purchaser is not bound to accept, nor a vendor to give, a title with an indemnity (*c*). Nor will a purchaser be obliged to take an equitable title, unless the Court sees that the legal estate can be got in (*d*). But he will be compelled to take a title depending upon the destruction of contingent remainders, or upon the Statute of Limitations (*e*). 1621.

Title with indemnity.  
Equitable title.

Destruction of contingent remainders.  
Statute of Limitations.

Title incomplete.

It is no objection that, at the time of the agreement, matters remained to be done to complete the title, which in their nature were capable of being effected before the completion of the purchase (*f*). 1622.

Compensation.

Some objections properly constitute subjects of compensation, while others do not. Thus, small rents may be subjects of compensation, although larger ones cannot (*g*). But there are some rights (such as a right of sporting) which, although in themselves of small value, are incapable of compensation, and therefore, if undisclosed, vitiate the contract (*h*). 1623.

Lessor's title.

Before the stat. 37 & 38 Vict. c. 78, s. 2, unless there was a stipulation to the contrary, there was in every contract for the sale of a lease (even though it were more than sixty years old), an implied undertaking, at law and in equity, to make out the lessor's title to demise, as well as

(*a*) Sugd. Concise View, 280, 283—4.

(*b*) *Hamilton v. Buckmaster*, L. R. 3 Eq. 323; *Beioley v. Carter*, L. R. 4 Ch. Ap. 230; *Radford v. Willis*, L. R. 7 Ch. Ap. 7; *Bell v. Holthby*, L. R. 15 Eq. 178.

(*c*) Sugd. Concise View, 219, 277.

(*d*) Sugd. Concise View, 280; *Freeland v. Pearson*, L. R. 7 Eq. 246, 249.

(*e*) Sugd. Concise View, 283.

(*f*) Sugd. Concise View, 184, 186.

(*g*) Sugd. Concise View, 276.

(*h*) Sugd. Concise View, 218.

Pr. III. T. 10,  
Ch. 2, s. 2.

that of the vendor to the lease itself, even though there was a very short residue of the term, and the value of the property was very small, and no premium was taken for the lease (a). But by the stat. 37 & 38 Vict. c. 78, s. 2, rule 1, it is enacted that, "subject to any stipulation to the contrary," "under a contract to grant or assign a term of years, whether derived or to be derived out of a freehold or leasehold estate, the intended lessee or assign shall not be entitled to call for the title to the freehold." And a purchaser of a lease held under a bishop cannot call for the lessor's title (b). **1624.**

[These restrictions are extended by stat. 44 & 45 Vict. c. 41, s. 13 (Appendix), which enacts, with respect to contracts made after the 31st of December, 1881, so far as a contrary intention is not expressed therein, that "on a contract to grant a lease for a term of years to be derived out of a leasehold interest with a leasehold reversion, the intended lessee shall not have the right to call for the title to that reversion." And stat. 45 & 46 Vict. c. 39, s. 4 (Appendix), enacts that "where a lease is made under a power contained in a settlement, will, Act of Parliament, or other instrument, any preliminary contract for or relating to the lease shall not, for the purpose of the deduction of title to an intended assign, form part of the title, or evidence of the title, to the lease."] **1624a.**

Lands allotted under Inclosure Acts become liable to the uses of the estates in respect of which they were allotted; and therefore, upon the sale of such lands, it is necessary to investigate the title to the original estates (c). **1625.**

Title to  
lands  
allotted.

Under Inclosure Acts, the allotments taken in exchange

Title to

(a) Sugd. Concise View, 268; 1 Jarm. & Byth. by Sweet, 70, 561; *Souter v. Drake*, 5 B. & Ad. 992; *Frend v. Buckley*, L. R. 5 Q. B. (Ex.

Ch.) 213.

(b) Sugd. Concise View, 268; 1 Jarm. & Byth. by Sweet, 70.

(c) Sugd. Concise View, 271.

Pr. III. T. 10,  
Ch. 2, s. 2.

lands taken  
in exchange.

are usually impressed with the title of the property given in lieu of them, and discharged from their original uses (*a*). But if the property has been derived under a common law exchange or an exchange by mutual conveyances with eviction clauses, the title to the estate given in exchange, as well as of the estate taken in exchange, must be shown from the usual period down to the date of the exchange; unless, in the case of a common law exchange, it can be proved that the lands given in exchange have been aliened by the other party (*b*). 1626.

Title to en-  
franchised  
land.

[In case of contracts for sale made on or before the 31st of December, 1881,] if the estate was copyhold, and has been enfranchised, the lord's title to the freehold will be required, as well as the copyholder's title before its extinguishment (*c*). [But under a contract in which a contrary intention is not expressed, made after that date, for sale of the freehold, the title to make the enfranchisement cannot, by virtue of s. 3 (Appendix) of 44 & 45 Vict. c. 41, be now called for (*d*).] 1627.

Title to  
property  
derived  
under a  
grant from  
the Crown.

Reversions and remainders in the Crown were not destructible by recovery, nor can they now be barred by an enrolled assurance; and it is therefore necessary, in deducing a title under a grant from the Crown, to set forth the original grant, in order that it may be seen whether any interest remains in the Crown or not, or whether any rent, condition, or service has been reserved (*e*). 1628.

Title to  
tithes.

The foundation of a title to tithes as an existing lay property, must be a grant from the Crown after the dissolution of the monasteries. But it is not necessary to deduce the title from that period. The title following the grant

(*a*) 4 Jarm. & Byth. by Sweet, 6,  
7: see also Sugd. Concise View, 271.

(*b*) 1 Jarm. & Byth. by Sweet, 75;  
Sugd. Concise View, 271; 4 Jarm.  
& Byth. by Sweet, 3, 5; Watk.  
Conv. 3rd ed. by Prest. 181.

(*c*) Sugd. Concise View, 270; 1  
Jarm. & Byth. by Sweet, 83.

(*d*) Supra, par. 359a.

(*e*) 1 Jarm. & Byth. by Sweet.  
68.

may commence at the same period as the title to the estate out of which they issue would have done (a). **1629.**

Pr. III. T. 10,  
Ch. 2, s. 2.

### SECTION III.

#### *Of Defects in the Title (b).*

If the purchaser accepts an abstract as showing a satisfactory title, yet he is not precluded from showing by other evidence that the title is a bad one (c). **1630.**

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Ch. 2, s. 3.

Purchaser may show title to be bad, though no defect appear on abstract.

Unless a vendor or his agent suppresses an incumbrance or a defect in the title, a purchaser cannot obtain relief against a vendor for any incumbrance or defect in the title which is altogether overlooked, and to which his covenants do not extend (d). And although the vendor has fraudulently concealed an incumbrance, yet the purchaser has no lien on the purchase money after it is appropriated by the vendor (e). **1631.**

Where there is no relief against a defect or incumbrance.

A decision of the House of Lords when once pronounced in a particular case is conclusive in that case, and cannot be reversed except by Act of Parliament. But it would seem that if the House should afterwards be of opinion that an erroneous principle had been adopted in the first case, the House would not be bound in any other to adhere to such principle (f). And a decision by the House of Lords, in favour of the validity of a title, if in a suit between a vendor and purchaser only, would be no more than a precedent for a decision in favour of the title, if it should be attacked by a third party (g). **1632.**

Decision by the House of Lords.

A purchaser, by entering into possession, is generally

Waiving objections.

(a) Sugd. Concise View, 267.

(d) Sugd. Concise View, 6, 406—411.

(b) See 22 & 23 Vict. c. 34, s. 24, and 23 & 24 Vict. c. 38, s. 8, as to the punishment for fraudulent concealment or falsifying a pedigree by a vendor or mortgagor.

(e) Sugd. Concise View, 411.

(f) *Wilson v. Wilson*. 5 H. L. Cas. 40, 63, 71.

(g) Sugd. Concise View, 281.

(c) Sugd. Concise View, 315.

Pr. III. T. 10.  
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Protection  
by means of  
an assign-  
ment of a  
statute,  
recogni-  
zance, or  
judgment.

held by that act to have waived those objections to the title of which he had distinct information. But if possession is authorized by the contract to be taken before a title is made, the fact of taking possession cannot by itself amount to a waiver of objections. Nor will acts of ownership after an authorized possession, or the preparation of a conveyance (a) [and in some cases even the execution of a conveyance (b)]. And, with the vendor's concurrence, a purchaser, without waiving objections thereby, may safely take possession of the estate at the time the contract is entered into; as he cannot be held to have waived objections of which he was not aware (c). 1633.

A purchaser without notice of any incumbrances may protect himself from them, by means of an assignment of a statute, recognizance, or judgment (d). 1634.

Discharge  
of incum-  
brances on  
sale.

By the stat. 37 & 38 Vict. c. 78, s. 2, rule 3, it is enacted that, "subject to any stipulation to the contrary," "the inability of the vendor to furnish the purchaser with a legal covenant to produce and furnish copies of documents of title shall not be an objection to title in case the purchaser will, on the completion of the contract, have an equitable right to the production of such documents." 1635.

[Under stat. 44 & 45 Vict. c. 41, s. 5 (Appendix), the Court is empowered to make provision for incumbrances on land sold, and to declare the land to be freed therefrom.] 1635a.

(a) Sugd. Concise View, 244—6;  
*In re Gloag and Miller*, L. R. 23  
Ch. D. 320.

12 Q. B. D. 32.

(c) Sugd. Concise View, 7.

(d) 2 Cruise T. 14, § 107.

(b) *Palmer v. Johnson*, L. R.



## CHAPTER III.

## OF THE PARTICULARS AND CONDITIONS OF SALE.

WHERE property is sold by auction, it is the office of the particulars to give an accurate description of the property, and the office of the conditions to state the terms on which the sale is made. And where the property is in mortgage, this should appear on the face of the particulars, and not merely by the conditions of sale (a). **1636.**

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Office of  
particulars  
and of con-  
ditions of  
sale.

The practice of keeping back the conditions of sale until the auction, is "one which is to be reprobated in the strongest manner" (b). **1637.**

It is now a very general practice for vendors to take the precaution of having their title investigated before they attempt to sell, in order that they may know upon what conditions to offer the property for sale (c). **1638.**

Investiga-  
tion of title  
by vendor  
to determine  
on what  
conditions to  
sell.

A prudent vendor invariably resorts to special conditions, wherever the circumstances of his title render it probable that he may be unable to enforce a contract entered into without such protection, or may be put to great expense by unreasonable or unnecessary requisitions on the part of the purchaser (d). Hence, special conditions are frequently resorted to in order to guard against the liability to produce titles upon exchanges, inclosures, renewable leaseholds, or the like, and to provide for apportionment of rents, so as to be binding on purchasers, or to

When  
special  
conditions  
are requisite.

(a) *Torrance v. Bolton*, L. R. 14 Eq. 124, 133—5; 8 Ch. Ap. 118.

(b) *Malins, V.-C.*, in *Torrance v. Bolton*, L. R. 14 Eq. 132—3.

(c) 9 Jarm. & Byth. by Sweet. 48; 1 Jarm. & Byth. by Sweet, 505.

(d) 9 Jarm. & Byth. by Sweet. 48.

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make the purchaser take subject to unusual liabilities; such as a liability to an original rent and the covenants in the original lease, where only part of the property is sold (a). 1639.

Where they  
must be  
avoided.

But unusual conditions should be avoided, even where property is sold by one who is absolutely entitled to it, unless such conditions are necessary; because they tend to alarm and disgust purchasers and their solicitors (b). And where property is sold by trustees, mortgagees, or assignees, this caution is particularly needful; for if they unnecessarily impose any unusual conditions which may cause the property to fetch a less price than it otherwise would, they may render themselves liable for a breach of trust (c). Yet at the same time there may be cases where they may render themselves equally liable, if they omit the protection of special conditions, where they are clearly necessary (d). 1640.

How they  
must be  
expressed.

It is the duty of persons who put up property for sale by auction, to describe it with perfect accuracy, and not merely in such a way that a person, by drawing proper inferences from everything that is stated, may be able to ascertain what is sold (e). 1641.

Special conditions should be very clearly and precisely expressed; for if a vendor sells property under stipulations which are against common right, whether contained in the contract itself or in conditions of sale, but uses ambiguous words, the purchaser may generally construe them in the manner most advantageous to himself (f). Hence a life annuity to which an estate is subject, granted for several

(a) Sugd. Concise View, 28.

(b) Sugd. Concise View, 28.

(c) See Sugd. Concise View, 45; 9 Jarm. & Byth. by Sweet, 48.

(d) See 9 Jarm. & Byth. by Sweet, 48.

(e) *Swaisland v. Dearsley*, 29

Beav. 430.

(f) Sugd. Concise View, 242; *Symons v. James*, 1 Y. & C. N. R. 487—490; *Seaton v. Mapp*, 2 Coll. 562; *Rhodes v. Ibbetson*, 4 D. M. & G. 787, 790—3; *Greaves v. Wilson*, 25 Beav. 290.

lives and the life of the survivor, should be so described, PART III.  
T. 10, CH. 3. and not simply as "a life annuity," which might be for one life only (a). **1642.**

Special conditions of sale must not be such as to entrap the purchaser; and they must not be founded on any erroneous statement of fact (b). **1643.**

A condition that the vendor shall be at liberty to rescind the contract, "if the purchaser shall show any objection, whether of title, conveyance, or otherwise, and shall insist thereon," or "if the purchaser shall insist on any objections or requisitions which the vendor may be unable or unwilling to remove or comply with," does not authorize the vendor to rescind the contract, where he has no title at all, or without attempting to answer the requisitions, although some of them are untenable; but the vendor is bound to answer them, and give the purchaser an opportunity of either waiving or insisting upon them. And the vendor has duties which he cannot get rid of by such conditions. So that there are some things which the purchaser has not only a right to make the subject of requisition, but even to insist on them, notwithstanding any such condition: as for instance, that a mortgagee shall be paid off and concur in the conveyance (c). But if the purchaser takes an objection to the title of part of the property, the removal of which might involve a long and expensive inquiry, the vendor has a right to avail himself of a condition enabling him to rescind, if any objection were persisted in (d). **1644.**

A condition that all objections to the title must be delivered within a given time, or shall be deemed waived, Conditions as to time for taking objections.

(a) *Drysdale v. Mace*, 5 D. M. & G. 103.

(b) *Harnett v. Baker*, L. R. 20 Eq. 50; *In re Banister, Broad v. Muntou*, L. R. 12 Ch. D. (Ap.) 131, 134.

(c) *Greaves v. Wilson*, 25 Beav. 290; *Turpin v. Chambers*, 29 Beav. 104; *Bowman v. Hyland*, L. R. 8 Ch. D. 588.

(d) *Mawson v. Fletcher*, L. R. 6 Ch. Ap. 91.

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is binding (a). But a condition stipulating that the time appointed, after the delivery of an abstract, for the taking of objections, shall be of the essence of the contract, means after the delivery of a perfect abstract, so far as it could be furnished at the date of delivery (b). And the purchaser is not precluded from taking objections which arise out of evidence called for before the time limited (c), or from objecting that the vendor has no power to make a title at all; as where the sale is under a power of sale which has not yet arisen (d). **1845.**

Condition as  
to range of  
title.

A purchaser is frequently precluded by a condition from calling for a title antecedent to a certain period, and sometimes a very recent period; as the vendor's conveyance or a late Inclosure Act, etc. (e). But this does not preclude the purchaser from showing that such anterior title is defective (f). Where, therefore, such anterior title is defective, the vendor should further stipulate that he shall not be considered as answerable for any defects of title which may be discovered (g). And even this would not preclude the purchaser from objecting, where there is a false recital concealing a defect of title prior to the date fixed upon, and the sale is made by a Court of Equity (h). **1846.**

A special condition of sale, limiting the extent of title, [was] no excuse for a purchaser not insisting on the production of a deed beyond those limits, of which he had actual or constructive notice (i). [But as to this see par. **1863a.**] **1847.**

Where a vendor knows of a deed affecting the title, he

(a) Sugd. Concise View, 15.

(b) Sugd. Concise View, 194; *Want v. Stallibrass*, L. R. 8 Ex. 175.

(c) Sugd. Concise View, 15, 16.

(d) *Want v. Stallibrass*, L. R. 8 Ex. 175.

(e) 1 Jarm. & Byth. by Sweet, 505.

(f) 9 Jarm. & Byth. by Sweet, 3.

See also Sugd. Concise View, 14; *Smith v. Robinson*, L. R. 13 Ch. D. 148.

(g) 9 Jarm. & Byth. by Sweet, 3.

(h) *Else v. Else*, L. R. 13 Eq. 196.

(i) *Peto v. Hammond*, 30 Beav. 495.

does not protect himself from disclosing it by a condition of sale providing that no requisition or inquiry should be made in respect of a specified deed, or any other prior to a certain date : for it would be most mischievous to allow a vendor to suppress facts known to him affecting the title, and yet compel a purchaser to accept it (a). **1648.**

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It was a common practice to restrain a purchaser from calling for evidence of extrinsic facts (as heirship, intestacy, death, etc.) which are recited or taken notice of in deeds of a certain antiquity, as, for instance, in deeds thirty years old, unless the circumstances of the title require that a more recent period should be fixed upon (b). [But this is modified by stat. 37 & 38 Vict. c. 78, s. 2, rule 2, which enacts] that, "subject to any stipulation to the contrary," "recitals, statements, and descriptions of facts, matters, and parties contained in deeds, instruments, Acts of Parliament, or statutory declarations, twenty years old at the date of the contract, shall, unless and except so far as they shall be proved to be inaccurate, be taken to be sufficient evidence of the truth of such facts, matters, and descriptions." [And this enactment is extended by the provisions of stat. 44 & 45 Vict. c. 41, s. 3 (Appendix) (c).] **1649.**

Conditions  
as to  
evidence.

If a condition of sale, as a ground for excluding the purchaser from evidence of title to which he would otherwise be entitled of common right, makes an assertion of a fact, such assertion must be proved. Thus, if a condition states that, as certain lands were allotted in respect of a manor, and the manor, with the allotments, was purchased by the vendors' testator, the title of the vendors to the manor shall be conclusive evidence of their title to the lands ; the purchaser is entitled to proof of the two assertions on which this condition is grounded (d). Where it

(a) *Edwards v. Wicknear*, L. R. 120, 121, 505.

1 Eq. 68; *Smith v. Robinson*, L. R. (c) *Infra*, par. 1663a.

13 Ch. D. 148.

(d) *Symonds v. James*, 1 Y. & C.

(b) 1 Jarm. & Byth. by Sweet, N. R. 487.

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is a condition of sale that no further evidence of the identity of the parcels shall be required than what is afforded by the abstract, or by the deeds, instruments, or other documents therein abstracted, and the descriptions in the different documents differ among themselves and from the description in the particulars of sale, the purchaser is entitled to have some proof of the identity aliunde. For, in the case supposed, the deeds themselves do not afford evidence of the identity, but constitute the subject of the doubt as to the identity (a). Where it is stipulated that the vendor shall deduce a good title, and that he shall deliver up to the purchaser of the greater part in value of the estate all the title deeds and documents in his custody, but shall not be bound or required to produce any original deed or other documents than those in his possession and set forth in the abstract, the word "produce" means "deliver up." The stipulation does not exempt the vendor from producing the deeds themselves for the purpose of verifying the abstract. For otherwise the vendor might have furnished an abstract of a good title, and yet he might not have one deed, or only some immaterial deeds, corresponding with the abstract, so that the abstract might be wholly unverified, and the purchaser might have no title at all (b). 1650.

Condition as  
to errors and  
misdescrip-  
tions.

A condition that misdescriptions and errors shall not annul the sale, but that a compensation shall be given for the difference in value, does not extend to fraudulent errors or very substantial misdescriptions (c). In some cases the purchaser will, in others he will not, lose his right to compensation by taking a conveyance (d). 1651.

(a) *Flower v. Hartopp*, 6 Beav. 476.

(b) *Southby v. Hutt*, 2 My. & Cr. 207.

(c) Sugd. Concise View, 20—1; *Phillips v. Cuddeleugh*, L. R. 4

Q. B. 159; see *Whittemore v. Whittemore*, L. R. 8 Eq. 603.

(d) *Manson v. Thacker*, L. R. 7 Ch. D. 620; *In re Turner and Skelton*, L. R. 13 Ch. D. 130; *Palmer v. Johnson*, L. R. 12 Q.B. D. 32.

Where a defect is a latent one, and the purchaser cannot by the greatest attention discover it, if the vendor is aware of it and does not acquaint the purchaser with the fact, the contract is not binding at law or in equity, although he bought the estate with all faults (a). **1652.**

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Latent defect where estate is bought with all faults.

[There must have been express conditions where the seller intended to throw upon the purchaser the expense of searches, or the expense of travelling to a distant place to examine the abstract with the deeds, or the like (b). Where the title deeds could not be delivered up, it must have been provided that the expense of attested copies thereof, and of covenants to produce them, should be borne by the purchaser, as otherwise the expense would fall on the vendor; and if the property was sold in several lots, and the deeds were numerous, a large proportion of the purchase money might be thereby absorbed (c).] **1653.**

Condition as to expenses.

By the stat. 37 & 38 Vict. c. 78, s. 2, rule 4, it is enacted that, "subject to any stipulation to the contrary," "such covenants for production as the purchaser can and shall require shall be furnished at his expense, and the vendor shall bear the expense of perusal and execution on behalf of and by himself, and on behalf of and by necessary parties other than the purchaser." [And this enactment is extended by the provisions of stat. 44 & 45 Vict. c. 41, s. 3 (Appendix) (d).] **1654.**

As a general rule, where a contract for purchase provides that "possession" shall be given by a certain day, the word "possession" must be understood to mean possession with a good title shown (e). **1655.**

Condition as to possession.

A condition for payment of interest, if, by reason of any "unavoidable obstacle," the contract cannot be completed

Condition as to interest.

(a) Sugd. Concise View, 238.

(d) *Infra*, par. 1663a.

(b) Sugd. Concise View, 24.

(e) *Tilley v. Thomas*, L. R. 3

(c) Sugd. Concise View, 24; 9 Ch. Ap. 61.

Jarm. & Byth. by Sweet, 8.

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Conditions intended to preclude objections on account of the lessor's title are to be construed with great strictness, and must be very unambiguous and conclusive to be of any avail. And a condition that the seller shall not be liable to produce the lessor's title, or that no requisition or inquiry shall be made respecting the title, does not exclude the purchaser from showing aliunde, without the aid of requisitions, that the title is bad (a). Where a lease is sold, although the reference to the lease binds the purchaser, yet unusual covenants should be stated in the conditions (b). As surrendered leases are given up to the lessor, if the premises are held under a renewed lease expressly granted in consideration of the surrender of a former lease, there should be a condition that the purchaser "shall not require the production of, or the deduction of the title to, any surrendered lease which is referred to in the subsisting lease" (c). 1662.

A proviso in a contract for sale, that, if either party break the agreement, he shall pay a sum of money to the other, does not give either party an option to break the agreement, but it is of the nature of a penalty; and consequently a specific performance will be decreed, just as if no such proviso had been inserted (d). 1663.

[Certain specified conditions are now made applicable to contracts for sale, by stat. 44 & 45 Vict. c. 41 (Appendix), which enacts, by s. 3 : "(1) Under a contract to sell and assign a term of years derived out of a leasehold interest in land, the intended assign shall not have the right to call for the title to the leasehold reversion. (2) Where land of copyhold or customary tenure has been converted into freehold by enfranchisement, then, under a contract

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Penalty.

Stat. 44 & 45  
Vict. c. 41,  
s. 3.  
The Con-  
veyancing  
and Law of  
Property  
Act, 1881.

Application  
of stated  
conditions  
of sale to all  
purchases.

(a) Sugd. Concise View, 14, 268;  
9 Jarm. & Byth. by Sweet, 13;  
Waddell v. Wolfe, L. R. 9 Q. B.  
515.

(b) Sugd. Concise View, 19.  
(c) 9 Jarm. & Byth. by Sweet, 13.  
(d) Sugd. Concise View, 158.

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[to sell and convey the freehold, the purchaser shall not have the right to call for the title to make the enfranchisement. (3) A purchaser of any property shall not require the production, or any abstract or copy, of any deed, will, or other document, dated or made before the time prescribed by law, or stipulated, for commencement of the title, even though the same creates a power subsequently exercised by an instrument abstracted in the abstract furnished to the purchaser; nor shall he require any information, or make any requisition, objection, or inquiry, with respect to any such deed, will, or document, or the title prior to that time, notwithstanding that any such deed, will, or other document, or that prior title, is recited, covenanted to be produced, or noticed; and he shall assume, unless the contrary appears, that the recitals, contained in the abstracted instruments, of any deed, will, or other document, forming part of that prior title, are correct, and give all the material contents of the deed, will, or other document so recited, and that every document so recited was duly executed by all necessary parties, and perfected, if and as required, by fine, recovery, acknowledgment, enrolment, or otherwise. (4) Where land sold is held by lease (not including under-lease), the purchaser shall assume, unless the contrary appears, that the lease was duly granted; and, on production of the receipt for the last payment due for rent under the lease before the date of actual completion of the purchase, he shall assume, unless the contrary appears, that all the covenants and provisions of the lease have been duly performed and observed up to the date of actual completion of the purchase. (5) Where land sold is held by under-lease, the purchaser shall assume, unless the contrary appears, that the under-lease and every superior lease were duly granted; and, on production of the receipt for the last payment due for rent

[under the under-lease before the date of actual completion of the purchase, he shall assume, unless the contrary appears, that all the covenants and provisions of the under-lease have been duly performed and observed up to the date of actual completion of the purchase, and further that all rent due under every superior lease, and all the covenants and provisions of every superior lease, have been paid and duly performed and observed up to that date. (6) On a sale of any property, the expenses of the production and inspection of all Acts of Parliament, inclosure awards, records, proceedings of Courts, court rolls, deeds, wills, probates, letters of administration, and other documents, not in the vendor's possession, and the expenses of all journeys incidental to such production or inspection, and the expenses of searching for, procuring, making, verifying, and producing all certificates, declarations, evidences, and information not in the vendor's possession, and all attested, stamped, office, or other copies or abstracts of, or extracts from, any Acts of Parliament or other documents aforesaid, not in the vendor's possession, if any such production, inspection, journey, search, procuring, making, or verifying is required by a purchaser, either for verification of the abstract, or for any other purpose, shall be borne by the purchaser who requires the same; and where the vendor retains possession of any document, the expenses of making any copy thereof, attested or unattested, which a purchaser requires to be delivered to him, shall be borne by that purchaser. (7) On a sale of any property in lots, a purchaser of two or more lots, held wholly or partly under the same title, shall not have a right to more than one abstract of the common title, except at his own expense. (8) This section applies only to titles and purchasers on sales properly so called, notwithstanding any interpretation in this Act. (9) This section applies

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[only if and as far as a contrary intention is not expressed in the contract of sale, and shall have effect subject to the terms of the contract and to the provisions therein contained. (10) This section applies only to sales made after the commencement of this Act. (11) Nothing in this section shall be construed as binding a purchaser to complete his purchase in any case where, on a contract made independently of this section, and containing stipulations similar to the provisions of this section, or any of them, specific performance of the contract would not be enforced against him by the Court." ] 1663a.

## CHAPTER IV.

SOME MISCELLANEOUS POINTS IN THE LAW OF VENDORS  
AND PURCHASERS (a).

IN cases under the old law, where real property is devised or conveyed to be sold for, or is charged with, the payment of definite and ascertained sums only, and such payment is to take place at the time when the required amount is to be raised, the purchaser of such property is bound to see that the purchase money is applied in the fulfilment of the trust, unless expressly exempted by a provision by the author of the trust, although the estate be sold under the decree of a Court of Equity. But where the property sold constitutes the natural and primary fund for the payment of debts generally, or is expressly charged with, or conveyed or devised for, the payment of debts generally, and therefore, in order to ascertain the sums to the payment of which the property is liable, it would be necessary for the purchaser to take proceedings in equity; or where the purchaser, if bound to see to the application of the money, would be involved in a trust of long continuance; there, the purchaser, unless he has notice that there are no debts or notice of fraud, is not bound to see to the application of the purchase money (b). 1664.

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of purchaser  
to see to the  
application  
of the  
purchase  
money.  
General  
rules.

In illustration of these rules, it may be observed, that, as the personal estate, whether consisting of chattels personal or of chattels real, is liable at the common law, and constitutes the natural and primary fund for the payment

Specific  
points in  
illustration  
of the above  
rules as to  
the pur-  
chaser's  
obligation.

(a) See also next title.

(b) See Story's Eq. Jur. § 1126—1128, 1130—1134; Sugd. Concise View, 517, 518, 520. As to the

payment by mistake of part of the purchase money to a tenant for life or other party, see stat. 22 &amp; 23 Vict. c. 35, s. 13.

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of the debts of the testator generally, the purchaser of the whole or of any part of it, without notice that there are no debts, or that the sale was not made for payment of debts, is not bound to see that the purchase money is applied by the executors in the discharge of the debts (*a*), even if the testator has directed his real estate to be sold for payment of debts, whether specified or not, and has made a specific bequest of a part of his personal estate for a particular purpose or to a particular person, although such specific bequest is known to the purchaser, but he has no reason to suspect any fraudulent or unauthorized purpose; for, otherwise, before a person could become a purchaser of personal estate specifically bequeathed, it would be indispensable for him to come into a Court of Equity to have an account taken of the assets of the testator, and of the debts due from him, so as to ascertain whether it was necessary for the executor to sell (*b*). 1665.

The same rule, for the same reason, applies to real estate devised for or charged with the payment of debts generally (*c*); even though the trust is only to sell, or is a charge for, so much as the personal estate is deficient to pay the debts; and even though a specific part of the real estate is devised for a particular purpose or trust; if the whole real estate is charged with the payment of debts generally by the will. If, however, the trustee has only a power to sell, and not an estate devised to him then, unless the personal estate is deficient, the power to sell does not arise (*d*). 1666.

(*a*) Story's Eq. Jur. § 1126, 1128;  
2 Spence's Eq. Jur. 372, 377.

(*b*) Story's Eq. Jur. § 1129; 2  
Spence's Eq. Jur. 375—377; Sugd.  
Concise View, 526.

(*c*) Sugd. Concise View, 518;  
Story's Eq. Jur. § 1130; 2 Spence's

Eq. Jur. 380, 382; 1 White & Tudor's Leading Cases, 1st ed. 46—7;  
Sugd. V. & P. 13th ed. 543—4;  
*Elliott v. Merryman*, Barnard 78.

(*d*) Story's Eq. Jur. § 1131; 2  
Spence's Eq. Jur. 382; Sugd. Concise View, 521.

Where, in cases of real estate, the trust is for the payment of legacies or annuities only, or of specified or scheduled debts alone, or of both, but not of debts generally, the rule is different; for they are ascertained, and the purchaser must therefore see that the money is applied in discharge of them. But where the devise is for payment of debts generally, and also for the payment of legacies or annuities or specified debts, the purchaser is not bound to see to the application of the purchase money; because, to hold him liable to see the legacies or annuities or specified debts paid, would in fact involve him in the necessity of taking an account of all the debts and assets (a). 1667.

And the purchaser is not bound to see to the application of the purchase money where the specific objects of the trust are not pointed out (b). 1668.

But if there is collusion between the purchaser and the trustees, who are guilty of a misapplication, or if there is notice that the sale or mortgage is made for the purpose of a breach of trust, the estate will be liable (c). 1669.

In determining as to the liability of the purchaser, the Court will look to the deed or will alone, and not to subsequent events: so that where a testator makes a charge for payment of debts generally and legacies, and the debts are paid after the death of the testator, and the legacies only are left as a charge, that circumstance alone does not prevent the application of the rule (d). 1670.

Where the time appointed by the will for a sale of real estate is arrived, and the persons entitled to the money are infants or unborn, there the purchaser is not bound to see to the application of the purchase money; because that might involve him in a trust of long continuance.

(a) Story's Eq. Jur. § 1132; 2 Spence's Eq. Jur. 379, 382, 386, 389; Sugd. Concise View, 518, 520; *Robinson v. Lowater*, 17 Beav. 592.

(b) 2 Spence's Eq. Jur. 381.

(c) 2 Spence's Eq. Jur. 384; Sugd. Concise View, 520.

(d) 2 Spence's Eq. Jur. 383.

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But, if an estate is charged with a sum of money payable to an infant at his majority, the purchaser is bound to see the money duly paid at that time; for the estate will remain chargeable with it in his hands (a). 1671.

Where the money is to be applied by the trustee to certain purposes which require, on his part, time, delay, and discretion, it seems that the purchaser is not bound to see to the application of the purchase money (b). 1672.

Power to  
give receipts  
under the  
stat. 7 & 8  
Vict. c. 76,  
22 & 23 Vict.  
c. 35, 23 & 24  
Vict. c. 145,  
44 & 45 Vict.  
c. 41, and  
45 & 46 Vict.  
c. 38.

A general power to give a receipt in all these cases was provided by the stat. 7 & 8 Vict. c. 76. And although it was repealed as from the 1st of October, 1845, so that the power to trustees to give receipts under that Act extends only from the 1st of January to the 1st of October, 1845 (c); yet a general power is given by the stat. 22 & 23 Vict. c. 35, s. 23, by the [now repealed] stat. 23 & 24 Vict. c. 145, s. 29, [by the stat. 44 & 45 Vict. c. 41, s. 36 (Appendix), and by the stat. 45 & 46 Vict. c. 38, s. 40 (Appendix) (d).] 1673.

Receipt  
clause.

If the names of the trustees are inserted in the usual clause, that the receipts of the trustees shall be discharges, every trustee who has accepted the trust must join in the receipt for the purchase money, although he may have subsequently released the estate to the other trustees. But a trustee who never acted in or accepted the trust, but has renounced or released, need not join in any receipt (e). 1674.

Vendor's  
lien.

Where a vendor delivers possession of an estate to a purchaser, without receiving the purchase money, whether the estate be or be not conveyed, equity gives the vendor a lien on the land for the purchase money, that is, a hold upon it for the satisfaction of the money; and, to the

(a) Sugd. Concise View, 519;  
Story's Eq. Jur. § 1133; 2 Spence's  
Eq. Jur. 387.

(b) Sugd. Concise View, 519;  
Story's Eq. Jur. § 1134; 2 Spence's

Eq. Jur. 387.

(c) Sugd. Concise View, 521.

(d) See infra, Pt. IV. T. 1, c. 2.

(e) Sugd. Concise View, 524.



extent of the lien, the purchaser becomes a trustee for the vendor (a). And the burden of proof is on the purchaser, to establish that in the particular case it has been intentionally displaced or waived by the consent of the party (b). If, on the face of the conveyance, the consideration is expressed to be paid, and even if a receipt for it is indorsed on the back of it, and yet the money has not actually been paid, the vendor has a lien (c). And if a security has been taken for the money, the burden of proof has been adjudged to lie on the purchaser, to show that the vendor agreed to rest on the security and to discharge the land, or, at most, the taking of a security has been deemed to be no more than a presumption, under some circumstances, of an intentional waiver of the lien, and not as conclusive of the waiver (d). 1675.

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When the vendor has a lien against the vendee, it continues notwithstanding any devolution or transfer of the estate, except where it is extinguished by the countervailing equity of a bonâ fide purchaser for valuable consideration without notice, when clothed with the legal title. 1676.

Continuance thereof.

Hence it exists against the vendee and his heir, and against volunteers claiming under him ; against purchasers under him, with notice that he had not paid the purchase-money ; against purchasers having an equitable title only ; against assignees claiming by a general assignment under the bankrupt and insolvent laws ; against assignees claiming under a general assignment made by a failing debtor for the benefit of creditors ; and against a judgment creditor of the vendee, at least before an actual conveyance of the estate has been made to him (e). For, in each of these cases (except that of the bonâ fide purchaser for valuable consideration, without notice, who has only an equitable

Against whom it exists.

(a) See Sugd. Concise View, 528 ;  
Story's Eq. Jur. § 1215, 1217—1220.

Story's Eq. Jur. § 1225

(d) Story's Eq. Jur. § 1226.

(b) Story's Eq. Jur. § 1224.

(e) See Story's Eq. Jur. § 1228 ;

(c) Sugd. Concise View, 537 ;

Sugd. Concise View, 536—8.

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title), the party in possession has obviously no more equity against the lien of the vendor, than the vendee himself had, but clearly stands in the same situation and subject to the same equity. And although the *bonâ fide* purchaser, without notice, who has only an equitable title, has an equity quite distinct from that of his vendor, the first vendee, yet the equity of such purchaser to retain what he has paid for, is only equal to that of the first vendor to be paid for that which he has parted with: and when the equities are equal, and neither of the parties has the support of the legal title, the maxim applies, *Qui prior est in tempore potior est in jure*. 1677.

But the lien will not prevail against a *bonâ fide* purchaser for valuable consideration from the vendee, where such purchaser has paid his purchase money, and taken a conveyance of the legal estate, and had no notice, at the time of paying his money, that such vendee had not paid the purchase money (a); because, having given a valuable consideration for the estate, without notice, he has as much equity to retain what he has so paid for, as the original vendor has to be paid for that which he has parted with; and having this equal equity, the Court will not take from him the legal title with which he has clothed himself, but will act upon the maxim, that, where the equities are equal, the law shall prevail; so that, in this case, the vendor's lien is virtually extinguished by the countervailing equity of the purchaser from the vendee. But where a vendee has sold the estate to a *bonâ fide* purchaser without notice, if the second purchase money has not been paid, the original vendor may proceed against the estate for his lien, or against the purchase money in the hands of such sub-purchaser, for satisfaction (b). 1678.

Where the vendee has sold only a part of it, the part re-

(a) Story's Eq. Jur. § 1228. 1229.

(b) *Id.* § 1232.

tained by him is primarily chargeable with the lien. Where PART III.  
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Where an estate is sold for an annuity, it must be Sale of estate for an annuity. secured not only upon the estate, but also by the bond of the purchaser (b). 1680.

In the absence of a restriction in any particular case, by Sale by trustees or other persons not being owners. deed, will, or otherwise, a sale by trustees or persons not being owners may be made by private contract, or by public auction (c). But a sale by private contract by an agent authorised to sell by auction, is not valid, although the price be greater than was required (d). 1681.

If trustees rashly or improvidently, and without necessity, introduce a depreciatory condition, the sale may be set aside, at the instance of a cestui que trust, however small his interest may be, and though a good price may have been obtained (e). 1682.

By the stat. 37 & 38 Vict. c. 78, s. 3, "trustees who are either vendors or purchasers may sell or buy without excluding the application of the second section of this Act" (f). 1683.

A purchaser of an estate subject to incumbrances must Indemnity to vendor. indemnify the vendor against them. This applies to the purchase of a leasehold estate, and to the purchase of an equity of redemption. And if a purchaser who has not obtained a conveyance sells to another, the second purchaser is bound to indemnify him against any costs incurred in proceedings for his benefit (g). 1684.

Although an agreement be to sell and convey to two, Conveyance to one purchaser. their heirs, etc., some or one of them, yet the seller will not

(a) Story's Eq. Jur. § 1233 a.

8 Ch. Ap 902.

(b) Sugd. Concise View, 137.

(f) See supra, par. 1624, 1624 a,

(c) Sugd. Concise View, 42.

1635, 1649, 1654, 1661.

(d) Sugd. Concise View, 43.

(g) Sugd. Concise View, 137.

(e) *Dance v. Goldingham*, L. R.

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be warranted in conveying the estate to one of the purchasers only (a). 1685.

Re-sale of  
estate sold  
under au-  
thority of  
a Court of  
Equity.

If an estate is sold under the authority of a Court of Equity, and the purchaser re-sells at a profit behind the back of the Court before his purchase is confirmed, the second purchaser is considered a substituted purchaser, and must pay the additional sum into Court for the benefit of the estate (b). 1686.

Revocation  
of authority  
to sell or  
purchase.

A person who has authorised an agent to sell, may revoke the authority of the agent at any time before an agreement is executed according to the statute, although the agent has previously agreed verbally to sell the property. And an intended purchaser may in like manner revoke his authority to his agent to purchase (c). 1687.

Sale of "the  
goodwill."

The mere sale of the goodwill of a business will not prevent the vendor from setting up next door to the purchaser. But if he has engaged to abstain from doing so, he will then be bound. And he is not at liberty to solicit personally the customers of the old firm to deal with him (d). Nor is he at liberty to set up a precisely similar business under the old style or firm, although his name be the only one, with the addition of the words "and Co.," constituting the old style or firm. Nor is he allowed in any other manner to hold out that he is carrying on business in continuation of, or in succession to, the business carried on by the old firm. The mere sale does not oblige him to introduce the purchaser to the customers, or to recommend him to them, or to do any one act for the purpose of giving effect to the sale. But if the vendor has expressly engaged to do any such specific act, he will be compellable

(a) Sugd. Concise View, 554.

(c) Sugd. Concise View, 95.

(b) Sugd. Concise View, 53—4.

(d) *Labouchere v. Dawson*, L. R.

As to opening biddings, see 30 & 31  
Vict. c. 48, s. 7.

13 Eq. 322.

to do it, or may be made to give damages for the breach of his agreement (a). 1688. PART III.  
T. 10, CH. 4.

A covenant by a vendor on the sale of a goodwill, not to carry on the business within a certain distance, is broken by his selling goods to persons who, as he knows, reside within that distance, though the goods were sold at a shop beyond that distance, and though the seller did not in any way solicit their custom (b). 1689.

Although a trade mark is not strictly property, yet when a business is bona fide assigned for valuable consideration, the exclusive right to use a trade mark which has been appropriated to that business may be assigned with it (c). 1690. Use of a  
trade mark.

The purchaser of a life interest in stock in the public funds, is entitled to the dividends accruing between the date of the contract and its completion, in the absence of a stipulation to the contrary; this advantage being given him in consideration of the precarious nature of the property, which may determine in five minutes after the contract is entered into (d). 1691. Right to  
dividends  
on a sale of  
a life  
interest in  
stock.

Where an assignment is made to a person as a purchaser, for a consideration which is not paid, he is liable to a suit in equity by the vendor for the recovery of the purchase money, though he took the assignment as a Purchase in  
another's  
name, when  
purchase  
money not  
paid.

(a) 9 Jarm. & Byth. by Sweet, 653—4; *Churton v. Douglas*, 1 Johns. 174; remarks of M. R. in *Smith v. Everett*, 27 Beav. 453.

(b) *Brompton v. Beddoes*, 13 C. B. (N. S.) 588.

(c) *Leather Cloth Co. v. American Leather Cloth Co.*, 1 Hem. & Mil. 271; and see Sebastian on Trade Marks for the law relating to the assignment of trade marks, and goodwill.

(d) 9 Jarm. & Byth. by Sweet, 67. The writer has deemed it advis-

able not to enter upon the subject of evidence, as it embraces a wide field, which has been fully traversed in the works on evidence; and it involves points of practice which are foreign to the nature of this work as a book on the law of property. For many of the most useful points, the reader is referred to Sugd. Concise View, Chap. 10; and Sugd. V. & P. 13th ed. 11; Burton's Compendium, Chap. 1, sect. 7; and 1 Jarm. & Byth. by Sweet, 98—186.

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trustee for a third person, and on the faith of an acknowledgment in the deed and the assurance of such third person, as the real purchaser, that the purchase money had been paid (a). 1692.

Deposit.

A deposit is paid to the vendor as a guarantee that the contract shall be performed. And even where there is no clause of forfeiture of the deposit, if the purchaser repudiates the contract, he cannot have back the money, as the contract has gone off through his default (b). 1693.

(a) *Wilson v. Keating*, 4 D. & J. Ch. Ap. 512; and see Addison on Contracts, 8th ed. p. 897.

(b) *Ex parte Barrell*, L. R. 10

## TITLE XI.

### OF ALIENATION BY MERE WRITTEN AGREEMENT.

#### CHAPTER I.

##### OF ALIENATION AT LAW BY MERE WRITTEN AGREEMENT.

EVEN at the common law, corporations regularly could not grant lands, goods, or chattels, except by deed. But all natural persons might grant or give anything which lay in livery without deed (a). 1694.

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Alienation  
without  
deed.

But, in consequence of the Statute of Frauds, 29 Car. 2, c. 3, there must be a writing duly signed, if any estate beyond three years or even an estate for less than three years at a less rent than two-third parts of the value, be designed to pass (b). By s. 1, it is enacted, "that all leases, estates, interests of freehold, or terms for years, or any uncertain interests of, in, to, or out of any messuages, manors, lands, tenements, or hereditaments, made or created by livery and seisin only or by parol, and not put in writing, and signed by the parties so making or creating the same, or their agents thereunto lawfully authorised by writing, shall have the force and effect of leases and estates at will only, and shall not, either in law or in equity, be deemed or taken to have any other or greater force or effect." By the 2nd section, leases for three years, whereupon the rent reserved amounts to two-thirds of the full improved value, are excepted. And by the 3rd section it is enacted, "that

Statute of  
Frauds.

(a) 2 Pres. Shep. T. 229; Co. Litt. 169 a.

(b) 2 Pres. Shep. T. 228.





## CHAPTER II.

OF ALIENATION IN EQUITY BY MERE WRITTEN  
AGREEMENT.

AT law, contracts and covenants to sell, convey, or transfer land or other property, are considered simply as personal and executory contracts and covenants, and not as attaching to the property in any manner as a present or future charge or otherwise (*a*). But it is a maxim of equity that things agreed to be done shall be regarded as if actually performed, in respect to the consequences. And therefore, in equity, from the time of a contract for the sale of land, the vendor and his heirs, even though he did not covenant for them, and any person or persons claiming under him as a subsequent purchaser or as assignees in bankruptcy or insolvency, become, as to the land, trustees for the purchaser and his heirs, devisees, or vendees; and the purchaser and his representatives or assignees in bankruptcy or insolvency become, as to the money, trustees for the vendor and his personal representatives. In cases not within the stat. 17 & 18 Vict. c. 113, and 30 & 31 Vict. c. 69, the personal representatives so become trustees as to the money. But in cases within those statutes, the persons on whom the purchased land devolves become such trustees (*b*). 1698.

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T. 11, CH. 2

At law, contracts and covenants are considered merely as personal and executory; but in equity, as performed, in regard to consequences.

[And now in cases of death after the 31st day of December, 1881, it is provided by stat. 44 & 45 Vict. c. 41, s. 4 (Appendix), that "(1) where at the death of any person there is subsisting a contract enforceable

Completion of contract after death.

(*a*) See Story's Eq. Jur. § 714, cise View, 121—123, 143. And see 790. supra, par. 1391—3 a.

(*b*) Id. § 788—790; Sugd. Con-

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T 11, CH. 2.

against his heir or devisee for the sale of the fee simple or other freehold interest, descendible to his heirs general, in any land, his personal representatives shall, by virtue of this Act, have power to convey the land for all the estate and interest vested in him at his death, in any manner proper for giving effect to the contract. (2) A conveyance made under this section shall not affect the beneficial rights of any person claiming under any testamentary disposition, or as heir or next of kin of a testator or intestate.”] 1698a.

Notwithstanding the principle above mentioned, it has been held by Lord Hatherley, C. (reversing the decision of Lord Romilly, M. R.), that a vendor of land may receive the balance of the purchase money, and convey the estate to the purchaser, without regard to the receipt of a notice that the purchaser had agreed to assign the contract (a). 1699.

Vendor's  
right to  
interest,  
and pur-  
chaser's  
right to the  
profits.

In consequence of the principle above mentioned, the purchaser is entitled to the profits of the estate from the time fixed upon for completing the contract, whether he does or does not take possession of the estate; and the vendor, to interest for the purchase money, if it is not paid at the day; unless there is a material objection to the title, and it remains to be cleared up; or unless the delay is occasioned by the vendor, and he has notice from the purchaser or knows aliunde that the purchase money is lying idle; or unless the interest is greater in amount than the rents and profits; in which case the vendor will not be entitled to interest, but will have the interim rents and profits. This right to interest exists even in the case of a sale of a reversion; because the wearing out of the lives is equivalent to taking the profits. If no time is limited for the performance of the agreement, the purchaser

(a) *M'Creight v. Foster*, L. R. 5 Ch. Ap. 604; affirmed (nom. *Shaw v. Foster*), 5 H. L. 321.

must pay interest on the purchase money from the time of taking possession (a). Where a good title is not shown until a given period, the purchaser will pay interest only from that period, and he will of course take the rents from the same time (b). And interest on the purchase money of timber to be taken at a valuation will only commence from the valuation; because the increase in the value of the timber by growth is an equivalent for the interest (c). 1700.

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T. 11, CH. 2.

The vendor may stipulate that the purchaser shall pay interest at a given rate up to a given time, and then at a higher rate up to a subsequent time, and then at a still higher rate up to a still later time (d). 1701.

If a vendor cannot make a good title, and the purchaser's money has been lying ready without interest being made by it, the vendor must pay interest to the purchaser (e). 1702.

Where the  
vendor must  
pay interest.

The purchaser being considered as the owner of the property from the time of entering into the contract, he from that time bears the risk of accidents (f). 1703.

Risk.

In accordance with the maxim of equity above mentioned, if trustees under a power of sale make a legal contract for sale of the estate, the contract binds the estate; and though by the deaths of parties the power should be extinguished, yet the contract must be executed by those who have got an interest by the extinguishment of the power (g). 1704.

Contract by  
trustees.

It follows from the same maxim, that a purchaser, or, if he dies before the conveyance is executed, his heir, may devise, sell, or charge the estate before the conveyance is executed (h). 1705.

Devise, sale,  
or charge  
before con-  
veyance.

(a) Sugd. Concise View, 488—491, 494.

(b) Sugd. Concise View, 494.

(c) Sugd. Concise View, 491, 492.

(d) *Herbert v. Salisbury & Yeovil*

*R. Co.*, L. R. 2 Eq. 221.

(e) Sugd. Concise View, 499.

(f) 9 Jarm. & Byth. by Sweet, 13.

(g) Sugd. Concise View, 148, 149.

(h) Sugd. Concise View, 125, 138.

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Right of  
heir to have  
estate pur-  
chased out  
of his ances-  
tor's per-  
sonal estate.

As a further consequence of the same maxim of equity, where the purchaser died intestate before the conveyance, or where an estate contracted for after the will did not pass by it, the heir at law was entitled to have the estate purchased for his own benefit out of the personal estate of his ancestor (*a*). But by the stat. 17 & 18 Vict. c. 113, and the stat. 30 & 31 Vict. c. 69, this seems to be now altered (*b*). 1706.

On the same principle, if a person contracts with a builder to erect a house on a piece of ground belonging to him, and dies intestate before the house is finished, the heir at law is entitled to have the house finished at the expense of the personal estate of the intestate (*c*). 1707.

Sale for an  
annuity  
which ceases  
before the  
conveyance.

Upon the same principle, if the consideration is an annuity for the life of the vendor, though the vendor dies before the conveyance is executed, by which event the annuity ceases, yet the purchaser will be entitled to a specific performance of his contract (*d*). 1708.

Cesser of the  
estate or  
thing before  
conveyance.

On the same ground, the consideration must be paid, although the estate or thing itself be destroyed or cease (as in the case of the purchase of an annuity when the annuitant dies) between the agreement and the conveyance. And, on the other hand, the purchaser will be entitled to any benefit which may accrue to the estate in the interim (*e*). 1709.

Verbal  
agreements  
or variations  
of agree-  
ments.

In some cases effect is given by a Court of Equity to verbal agreements or variations of agreements; but this belongs more properly to the subject of equity jurisprudence, and is fully discussed by the writers on that subject (*f*). 1710.

(*a*) Sugd. Concise View, 133;  
*Greenwood v. Penny*, 12 Beav.  
406.

(*b*) See *supra*, par. 1391—3 a.

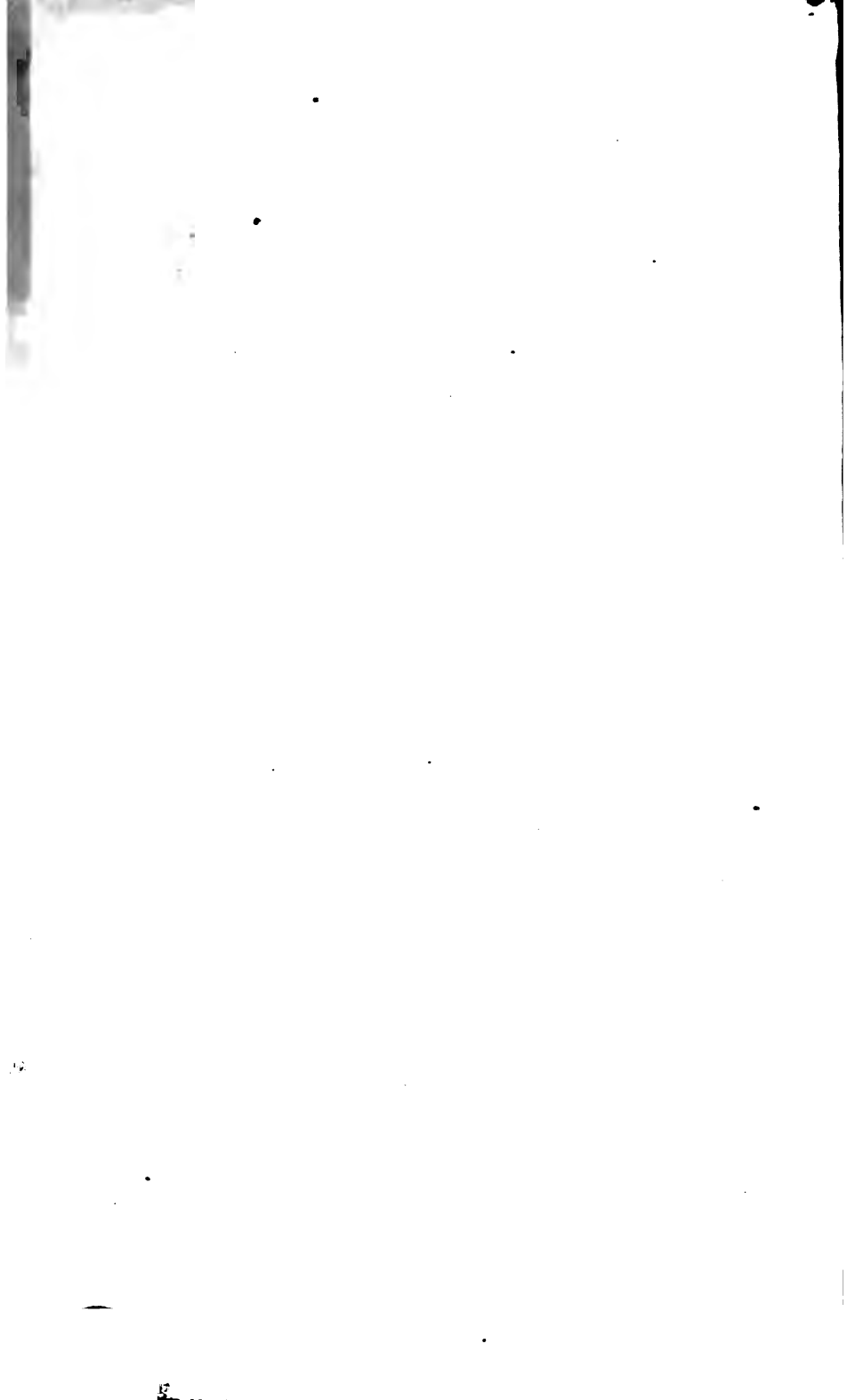
(*c*) *Cooper v. Jarman*, L. R. 3  
Eq. 98.

(*d*) Sugd. Concise View, 209.

(*e*) Sugd. Concise View, 205—6,  
209.

(*f*) See Story's Eq. Jur. § 754  
et seq.; and see Sugd. Concise View,  
Chap. 3.

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